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Issuing—Transfer—Collection
and
Validity of Municipal Bonds



THE LAW

GOVERNING THE ISSUING, TRANSFER AND COLLECTION OF

MUNICIPAL BONDS

BY
W. H. HARRIS
OF THE TOLEDQ, OHIO, BAR

SECOND EDITION

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PREFATORY.

The law of municipal bonds, in the United States, is a development of the last half century. The great body of the litigation involving such securities has been, and will continue to be, prosecuted in the Federal courts, and the rules of decisions of those courts in such cases are now recognized by all courts as the law of municipal securities.

In a continuous experience of about twenty years in the examination and collection of municipal bonds, it has been necessary for the author of this work to become familiar with the decisions of both the State and Federal courts on the subject; and, judging from his own experience, it has seemed to him that a full digest of all the decisions of the Federal courts of final jurisdiction involving the validity of municipal bonds would be of appreciable service to the bond lawyer, the bond buyer, and possibly to municipal officials who are required to issue bonds or provide for and direct their issuance. It has been the intention and aim of the author to digest and cite in this volume all the reported cases which have been decided by the Supreme Court and the several Circuit Courts of Appeals of the United States in which the validity of municipal bonds and the laws relied upon as authority for their issuance have been involved. If any have been omitted, such omission has been unintentional. Departing from the usual course in digesting, I have quoted liberally from the opinions, and I am induced to believe that the practical value of the work is thereby materially enhanced. Such quoted matter is indicated by the usual quotation marks; and the subject-matter, in each instance, of the language quoted as well as of my own digests, or the point decided, in each instance, is indicated by an appropriate headnote.

The whole subject is divided into eighteen chapters, most of which are subdivided, and the cases have been so appropriated to, and grouped in, the several chapters and subdivisions as, in the judgment of the author, will best facilitate the reference to, and examination together of, all the cases bearing upon any particular question. The citations and digests of the cases in each chapter are preceded by a short explanatory article prepared by the author which, it is believed, will be of appreciable assistance, especially to those who are comparatively unfamiliar with the subject.

The decisions on all collateral or kindred questions of law that have been decided in bond cases have been carefully noted. The chapter on "Remedies of Bondholders," I am induced to believe, will be of material assistance to a large number of lawyers who may be interested in the collection of such securities or in defending in actions for their collection.

WM. H. HARRIS.

TOLEDO, OHIO, *March*, 1902.

PREFACE TO SECOND EDITION

In compliance with the request of the publisher of this work I have prepared a second edition. All decisions of the United States Supreme Court and Circuit Courts of Appeals, involving municipal bonds and enabling statutes, which have been reported since the publication of the first edition, have been carefully digested and the digests have been placed in their appropriate positions in the several chapters of the book. The index has been carefully revised.

WM. H. HARRIS.

TOLEDO, OHIO, *January*, 1917.

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CHAPTER I.

MUNICIPAL CORPORATIONS AND OTHER PUBLIC BODIES; THEIR CHARACTER, POWERS, AND PURPOSES GENERALLY.

- A. Legislative control of public corporate bodies, restricted only by constitutional provisions.**
- B. Municipal corporations; powers and functions as state agencies and local governmental bodies.**
- C. Counties, townships, school districts, etc.; corporate powers and character.**

The several States, for the purpose mainly of facilitating the administration of the State government, are divided and subdivided into counties, townships, school districts, precincts, etc.; and cities, villages, and incorporated towns organized by, or under express authority of, the State, though performing some similar functions as State governmental agencies, are designed especially to exercise powers and duties of local administration, not independent of, but in pursuance of, and in accordance with, the laws and policy of the State. These public bodies are all endowed by the State, in its discretion, with corporate powers suitable to, and coextensive with, the purposes of their creation. They are all properly designated as public corporations; but the latter class only — cities, villages, etc.— are properly termed municipal corporations, though that term is usually applied to all such public corporate bodies.

A municipal corporation proper is organized at the request, or with the consent, of the inhabitants of the territory included within its limits. It voluntarily assumes the powers, duties, and liabilities conferred upon it and incident to the purposes of its creation. On the other hand, counties, townships, school districts, and other similar bodies are organized or formed by, and at the will of, the State, and, possessing comparatively limited corporate powers, are really but quasi-corporate bodies.

The fundamental differences in the character and purposes of these public bodies are generally recognized in the Constitutions of the several States, and in some instances their character, functions, and powers are in a measure prescribed or limited by those

instruments; but, subject to such constitutional provisions and others intended to control or restrict the powers and discretion of the legislature, all such public bodies are subject to the control of, and derive all their powers from, the legislature of the State, which may, in its discretion, confer or withhold any of the usual powers, or change, modify, or abolish those which have been conferred, and may prescribe, in its discretion, the manner in which, and the agencies by which, such powers shall be exercised. It follows that a correct understanding of the character and extent of the legitimate functions and powers of any such body involves a knowledge of all constitutional and statutory provisions relating thereto. As such public bodies can only exercise delegated powers, all grants of authority to them are strictly construed, and generally no such powers will be implied unless their exercise is deemed to be necessary to carry out some power which has been expressly granted.

A. Legislative Control of Public Corporate Bodies, Restricted only by Constitutional Provisions.

No inherent power of legislation.

1. (Iowa, 1865.) "A county, or other municipal corporation, has no inherent right of legislation, and cannot subscribe for stock in a public improvement, unless authorized to do so by the legislature. Such a corporation acts wholly under a delegated authority, and can exercise no power which is not in express terms, or by fair implication, conferred upon it. But the legislature of a State, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. And this authority can be conferred in such a manner, that the object can be attained, either with or without the sanction of the popular vote." *Thompson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177.

Municipal corporations creatures of legislature.

2. (Wis. 1865.) "Municipal corporations are created by the legislature, and they derive all their powers from the source of their creation; and those powers are at all times subject to the control of the legislature. Such powers, also, in the absence of any con-

stitutional regulation forbidding it, may be enlarged or diminished, extended or curtailed, or withdrawn altogether, as the legislature shall determine." *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79, *affd. in Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350.

Subject to legislative control.

3. (Ill. 1872.) "Such corporations are created by the legislature and they derive all their powers from the source of their creation, and those powers are at all times subject to the control of the legislature." *St. Joseph Township v. Rogers*, 16 Wall. 644, 21 L. Ed. 328.

Counties, cities, and towns are instruments of the state.

4. (Neb. 1872.) "Counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will. When they are authorized or directed to levy a tax, or to appropriate its proceeds, the State through them is doing indirectly what it might do directly. It is true the burden of the duty may thus rest upon a single political division, but the legislature has undoubted power to apportion a

public burden among all the taxpayers of the State or among those of a particular section. In its judgment, those of a single section may reap the principal benefit from a proposed expenditure, as from the construction of a road, a bridge, an almshouse, or a hospital. It is not unjust, therefore, that they should alone bear the burden. This subject has been so often discussed, and the principles we have asserted have been so thoroughly vindicated, that it seems to be needless to say more, or even to refer at large to the decisions. A few only are cited." *Railroad Co. v. County of Otoe*, 16 Wall. 667, 21 L. Ed. 375.

Are created by, and derive all their powers from, the legislature.

5. (Wis. 1879.) "Counties, cities, and towns are municipal corporations created by the authority of the legislature, and they derive all their powers from the source of their creation, except where the Constitution of the State otherwise provides. They have no inherent jurisdiction to make laws or to adopt governmental regulations, nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters or other statutes of the State.

"Corporations of the kind are composed of all the inhabitants of the territory included within the political organization, each individual being entitled to participate in its proceedings; but the powers of the organization may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic. Corporate rights and privileges are usually possessed by such municipalities; and it is equally true that they are subject to certain legal obligations and duties, which may be increased or diminished at the pleasure of the legislature, from which all their powers are derived.

"Institutions of the kind, whether called cities, towns, or counties, are the auxiliaries of the State in the important business of municipal rule; but they cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between themselves and the

legislature of the State, because there is not and cannot be any reciprocity of stipulation between the parties, and for the further reason that their objects and duties are utterly incompatible with everything partaking of the nature of compact." *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699.

6. (Ky. 1887.) Legislative control of counties in their financial management discussed. *Carter County v. Sinton*, 120 U. S. 517, 7 Sup. Ct. Rep. 640, 30 L. Ed. 701.

Issuing of bonds; loaning of municipal credit.

7. (Mo. 1890.) The legislature of a State can authorize municipal corporations to issue their bonds or loan their credit only under and subject to the restrictions of the Constitution. *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. Rep. 502, 33 L. Ed. 887.

Townships; legislative control of.

8. (S. Car. 1895.) "When a township has been created by law, as a territorial division of a State, with no express grant of corporate powers, and with no definition or restriction of the purposes for which it is created, we are of opinion that it is within the power of the legislature, at any time, to declare it to be a corporation, and to confer upon it such and so many corporate powers, appropriate to be vested in a territorial corporation for the benefit of its inhabitants, as the legislature may think fit." *Folsom v. Ninety-six*, 159 U. S. 611, 16 Sup. Ct. Rep. 174, 40 L. Ed. 278.

Corporate powers of county subject to legislative control.

9. (Colo. 1897.) "A county is an organized political subdivision of the State. It has such power, and such only, to contract loans and incur other forms of indebtedness as is expressly or by fair implication granted to it by the legislature of the State, which has plenary authority over that subject, as it has over all ordinary subjects of legislation, except in so far as its authority is taken away, curtailed, or restricted by the controlling force and effect of the provisions of the State Constitution." *Dudley v. Board of Comrs. of Lake County, Colo.*, 28 C. C. A. 82, 80 Fed. 672.

B. Municipal Corporations; Powers and Functions as State Agencies and Local Governmental Bodies.

Legislative control.

10. (Ind 1860.) "Municipal corporations are created by the authority of the legislature, and Chancellor Kent says they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are subject to the control of the legislature of the State. 2 Kent's Com. p. 275." *Bissell v. City of Jeffersonville*, 24 How. 287, 16 L. Ed. 664.

Are subordinate branches of the domestic government of the state; the powers of taxation, borrowing money, etc.

11. (Tenn. 1873.) "A municipal corporation is a subordinate branch of the domestic government of a State. It is instituted for public purposes only; and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution, it exists for the benefit of the people within its corporate limits. The legislature invests it with such powers as it deems adequate to the ends to be accomplished. The power of taxation is usually conferred for the purpose of enabling it to raise the necessary funds to carry on the city government and to make such public improvements as it is authorized to make. As this is a power which immediately affects the entire constituency of the municipal body which exercises it, no evil consequences are likely to ensue from its being conferred; although it is not unusual to affix limits to its exercise for any single year. The power to borrow money is different. When this is exercised the citizens are immediately affected only by the benefit arising from the loan; its burden is not felt till afterwards. Such a power does not belong to a municipal corporation as an incident of its creation. To be possessed it must be conferred by legislation, either express or implied. It does not belong, as a mere matter of course, to local governments to raise loans. Such

governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation.

"Our system of local and municipal government is copied, in its general features, from that of England. No evidence is adduced to show that the practice of borrowing money has been used by the cities and towns of that country without an act of Parliament authorizing it. We believe no such practice has ever obtained." *The Mayor v. Ray*, 19 Wall. 468, 23 L. Ed. 164.

A city a political subdivision of state.

12. (La. 1877.) "A city is only a political subdivision of the State, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing therefore a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly." *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521.

Are local governmental agencies of the state, with only delegated powers.

13. (Ill. 1883.) "Municipal corporations are created to aid the State government in the regulation and administration of local affairs. They have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of

the corporation as created and established. 1 Dill. Mun. Corps., § 89, 3d ed., and cases there cited. To the extent of their authority they can bind the people and the property subject to their regulation and governmental control by what they do, but beyond their corporate powers their acts are of no effect." *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. Rep. 361, 27 L. Ed. 669.

14. (Ill. 1887.) A "village" and an "incorporated town" mean the same thing when the powers conferred upon them are substantially the same, regardless of the name used. *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. Rep. 358, 30 L. Ed. 523.

Limitation upon power of municipal corporations; necessity for legislative authority to aid railroads, etc.

15. (Mo. 1890.) "Municipal corporations are established for purposes of local government, and, in the absence of specific delegation of power, cannot engage in any undertakings not directed immediately to the accomplishment of those purposes. Private corporations created for private purposes may contract debts in connection with their business, and issue evidences of them in such form as may best suit their convenience." *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. Rep. 502, 33 L. Ed. 887.

C. Counties, Townships, School Districts, etc.; Corporate Character and Powers.

Township in Missouri is but a geographical subdivision of a county.

16. (Mo. 1875.) "It has no power by itself to make independent contracts or to become bound in its separate capacity. The law has not invested it with that power. It forms an integral part of the county, and the county, to a certain extent, controls and acts for it." *Harshman v. Bates County*, 92 U. S. 569, 23 L. ed. 747.

17. (Ill. 1880.) Congressional townships in Illinois, under the name of trustees of schools, were incorporated for school purposes only, and have no authority to aid in the construction of railroads. *Weightman v. Clark*, 103 U. S. 256, 26 L. Ed. 392.

Precincts in Nebraska.

18. (Nebr. 1881.) "Precincts in Nebraska are but political subdivisions of a county. They have no corporate existence, and cannot contract or be contracted with. They have no corporate officers, and can neither sue or be sued. Certain officers are elected by the voters of precincts for political, administrative, and judicial purposes, but they are in no sense the representatives of the people of the territory as a municipality. *State v. Dodge County*, 10 Nebr. 20. Precincts are governed by the county commissioners, the governing board of the county, and by the appropriate officers of the State. Their relation to a county is like that of a ward to a city. Having no corporate exist-

ence, no separate municipal authority, they cannot, says again the Supreme Court of the State, in the last case cited, 'enter into contracts directly or indirectly, nor assume obligations which a court might be called on to enforce.'" *Davenport v. County of Dodge*, 105 U. S. 237, 26 L. Ed. 1018.

Counties in Nebraska not corporations.

19. (Nebr. 1884.) A county is not a corporation, within the meaning of the Constitution of Nebraska that "The legislature shall not pass any local or special laws . . . granting to any corporation, association, or individual any exclusive privileges, immunity, or franchises whatever." *Sherman County v. Simons*, 109 U. S. 735, 3 Sup. Ct. Rep. 502, 27 L. Ed. 1093.

No inherent power to issue commercial paper.

20. (Tenn. 1884.) The issuing of paper obligations of a commercial character by political subdivisions, such as counties and townships, is the exercise of a power entirely foreign to the purposes of their creation, and is never to be conceded except by express legislation or by necessary, or at least very strong, implication from such legislation. *Claiborne County v. Brooks*, 111 U. S. 400, 4 Sup. Ct. Rep. 489, 28 L. Ed. 470.

(Ill. 1887.) *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. Rep. 937, 30 L. Ed. 885.

Legislative control of the powers and officers of townships.

21. (N. J. 1890.) "The organization of townships, the number, character, and duties of their various officers, are matters of legislative control; and it is not doubtful that officers appointed represent the municipality as fully as officers elected. When the legislature has declared how an officer is to be selected, and the officer is selected in accordance with that declaration, his acts, within the scope of the powers given him by the legislature, bind the municipality." *Bernards Township v. Morrison*, 133 U. S. 523, 10 Sup. Ct. Rep. 333, 33 L. Ed. 766.

Board of education a distinct corporation.

22. (Kan. 1893.) The board of education of the city of Atchison, in the State of Kansas, is a distinct corporation, separate from the city of Atchison, and the proper one to be sued upon bonds issued by such board. *Atchison Board of Education v. De Kay*, 148 U. S. 591, 13 Sup. Ct. Rep. 706, 37 L. Ed. 573.

Irrigation districts public corporations.

23. (Cal. 1896.) "The formation of one of these irrigation districts amounts to the creation of a public corporation, and their officers are public officers." *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369.

Legislative control over counties and county officers; may authorize designated officers to contract on behalf of districts within county.

24. (Ky. 1894.) "There can be no serious question, under the decisions of the Supreme Court of Kentucky, that the legislature of that State has the constitutional power to authorize any subdivision of a county to subscribe for the stock of a railway company, and to issue bonds in payment of such subscription. So it may authorize a county to impose a special tax on the district making such subscription, and issuing such bonds, to pay the interest and principal thereof. To this end the legislature may create a political district with corporate powers, or it may authorize magisterial

districts, constable districts, or carve out a special district, and confer authority upon such territory by vote to charge such district with a subscription. So it may empower the county, of which such district is a part, to issue such bonds in behalf of the territory empowered to charge itself, the bonds to be payable only out of taxes levied and collected from the taxables of that tax district. The Kentucky decisions clearly settle these propositions. The power existed in the legislature to arbitrarily carve out a geographical district, and authorize its inhabitants to exercise the functions of a corporation, either through agencies created by themselves or through the agencies of the county. While the district subscribing is the debtor, yet in form the county is the obligor. Through the county the indebted district is to act, and through the same agency the indebted district is to be coerced by the assessment of the tax essential to meet its obligations. Such a district becomes, for the purposes of the subscription, a corporation *quoad hoc*." *Breckinridge County v. McCracken et al.*, 9 C. C. A. 442, 61 Fed. 191.

City school district independent of civil city government; application of statutory tax limit.

25. (S. Dak. 1899.) Under the laws of South Dakota, a city school district, under the name of "The Board of Education of the City of Huron," is a body corporate for school purposes, and distinct from and independent of the city of Huron, and is capable of contracting and being contracted with, and holding and conveying real and personal property for such purposes, and debts incurred by it are not subject to the limitation of indebtedness prescribed for the city of Huron. *Board of Education of City of Huron, S. Dak., v. National Life Ins. Co. of Montpelier, Vt.*; *Same v. Peaslee*; *Same v. Monadnock Sav. Bank of East Jaffrey, N. H.*, 36 C. C. A. 278, 94 Fed. 324.

Precincts in Nebraska not corporations.

26. (Nebr. 1900.) "A precinct, under the statutes of Nebraska, is a mere political subdivision of a county. It is not a municipal or quasi-municipal corporation or entity. It does not

govern itself. It does not choose its governing officers, and it can neither act nor contract for itself, sue nor be sued. It is the mere creation of the board of county commissioners of the county in which it is situated, and that board is vested with plenary power to bring it into existence, to act and contract for it while it is in being, and to enlarge, to diminish, and to destroy it." *Clapp v. Otoe County, Nebr.*, C. C. A. , 104 Fed. 473.

Townships in Ohio are not corporations.

26a. (Ohio, 1901.) Neither townships nor boards of trustees of townships in Ohio are corporations within the meaning of the provisions of section 1 of article 13 of the Constitution of that State, which prohibits the general assembly from passing any special act conferring corporate power. *Board of Trustees v. Brattleboro Savings Bank*, 106 Fed. 986, 46 C. C. A. 66.

CHAPTER II.

DEFINITION, NATURE, AND INCIDENTS OF MUNICIPAL BONDS, INTEREST COUPONS, WARRANTS, ETC.

A. Legal and commercial character of municipal bonds.

B. Interest coupons; negotiability and other incidents.

1. Interest coupons are negotiable and are independent causes of action.
2. Interest coupons bear interest after due, generally at legal rate where payable.

C. Municipal warrants and other nonnegotiable evidences of indebtedness.

By the term "municipal bonds" is meant evidences of indebtedness, issued by cities, incorporated towns, counties, townships, school districts, and other public corporate bodies, negotiable in form, payable at a designated future time, bearing interest payable annually or semi-annually, and usually having coupons attached evidencing the several installments of interest.

Municipal bonds issued in the usual negotiable form, when authorized by law, have all the attributes of negotiable commercial paper of individuals or private corporations; they are usually made payable to bearer; they pass by delivery, and, like other negotiable instruments, are not subject to equities between prior holders, in the hands of bona fide purchaser for value, before due, without notice of such equities. Municipal bonds, when authorized by law, may be issued to raise money for the purpose of constructing or carrying on authorized public improvements or works. They represent a large portion of the wealth of the country, and their commercial value in the market depends very largely upon their negotiable character.

By the issue of its bonds or other evidences of indebtedness, when legally authorized, a municipality acknowledges an obligation for, and promises to pay the sum named, and impliedly, if not expressly, agrees to provide the means of payment in the manner and from the source provided by law, but subject to all constitutional and statutory restrictions and limitations upon the power to make such provision. The necessary means for the payment

of any such obligations must be derived from some form of taxation. In some cases such provision is required to be made by a general tax on all the taxable property within the entire municipality, and in other cases by a special tax upon the taxable property of a special district less than the entire corporate body, or by a special assessment upon real estate within a limited district. Of this latter class are obligations issued by county boards in some States on behalf of precincts, townships, school districts, drainage districts and road districts, or by city boards, on account of sewer districts, street improvement districts, etc.

In some cases such special tax or assessment is the sole security and source of means for the payment of the obligations so issued by the officers of the corporate body, but in other cases the levy and collection of a general tax is expressly or impliedly authorized to meet such obligations when, for any reason, such special tax or assessment should not be collected or should prove inadequate.

From these considerations it follows that some bonds in form purporting to be the obligations of a municipal body are such corporate obligations in only a qualified sense, and are not such general obligations as may be discharged by the levy and collection of a general tax upon all the taxable property of the body at large.

These matters are all subjects of legislative control and discretion by the legislative bodies of the several States, subject only to controlling constitutional provisions. The interest coupons are likewise negotiable and bear interest from their maturity at the legal rate of interest where payable; and, when detached from the bonds, they constitute separate causes of action distinct from the bonds, and the holder thereof may sue thereon in his own name without producing, or being interested in, the bonds to which they were originally attached; but they are not independent of, or different from, the bonds from which they were taken in legal quality. In that respect they are but incidents of the bonds, the holder thereof being charged with notice of the contents of the bonds, and affected by their legal quality. If the bonds from which coupons are taken are void for want of authority to issue them, or are invalid for any reason, the coupons will be held likewise void or invalid, and when the bonds are valid the coupons will be held valid also.

Another form of municipal securities or obligations is ordinary vouchers, orders, or warrants executed by officers authorized to execute them in conducting the financial affairs of the municipality. They are usually transferable by delivery, with or with-

out indorsement, so as to pass the legal title to the transferee, but they are not generally negotiable within the meaning of the law merchant.

A. The Legal and Commercial Character of Municipal Bonds.

Certificates of loan same as bonds.

27. (Pa. 1860.) "Such certificates are well and distinctly known and recognized in the usages and business of lending and borrowing money in the transactions of commerce, also, and for raising money upon the contract in them for industrial enterprises and internal improvements. They were formerly more generally known than otherwise as 'Certificates of loan' with certificates for interest attached, payable to the bearer at particular times within the year, at some particular place, being a part of the contract, from which they must be cut off to be presented for payment. But now, in their use, they are called bonds, with coupons for interest—a coupon bond—coupon being the interest payable separable from the certificate of loan, for the purpose of receiving it. But neither the instrument nor coupon has any of the legal characteristics of a bond, either with or without a penalty, though both are written acknowledgments for the payment of a debt." *Henry Amey v. The Mayor, Aldermen, and Citizens of Allegheny City*, 24 How. 364, 16 L. Ed. 614.

Are negotiable commercial securities.

28. (Ind. 1862.) "We think that the bonds in this case, with interest warrants annexed, are commercial securities, though they are not in the accustomed forms of promissory notes or bills of exchange; that the parties intended them to be passed from hand to hand to raise money upon them, so that a full title was intended to be conferred on any person who became the legal holder of them, and that the original maker under such circumstances has no equity to prevent the recovery of the interest." *Moran et al. v. The Commissioners of Miami County*, 2 Black, 722, 17 L. Ed. 342.

Bonds payable to bearer; effect of corporate seal.

29. (Pa. 1863.) "This species of bonds is a modern invention, intended

to pass by manual delivery, and to have the qualities of negotiable paper, and their value depends mainly upon this character. Being issued by States and corporations, they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usages of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recognition, not only in this court but of nearly every State in the Union, is well known and admitted." *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548.

30. (Iowa, 1863.) "Bonds and coupons, like these, by universal commercial usage and consent, have all the qualities of commercial paper." *Gelpcke v. City of Dubuque*, 1 Wall. 175, 17 L. Ed. 520.

Title to municipal bonds passes by delivery.

31. (N. Y. 1864.) "The possession of such paper carries the title with it to the holder: 'The possession and title are one and inseparable.'" *Swift*

v. Tyson, 19 Pet. 1; Goodman v. Simonds, 20 How. 343, and Bank of Pittsburg v. Neal, 22 How. 96, followed. Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857.

Are negotiable securities and pass by delivery.

32. (Iowa, 1865.) "Bonds with coupons, payable to bearer, are negotiable securities, and pass by delivery, and in fact have all the qualities and incidents of commercial paper." Thompson v. Lee County, 3 Wall. 327, 18 L. Ed. 177.

Are negotiable instruments; possession evidence of title.

33. (Kan. 1876.) "Bonds of the kind executed by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are valid commercial instruments, and, if purchased for value in the usual course of business before they are due, give the holder a good title, free of prior equities between antecedent parties, to the same extent as in case of bills of exchange and promissory notes." "Possession, even without explanation, is prima facie evidence that the holder is the proper owner or lawful possessor of the instrument." Commissioners of Marion County v. Clark, 94 U. S. 278, 24 L. Ed. 59.

Are negotiable instruments freed from infirmities in the hands of bona fide holders.

34. (Iowa, 1877.) "Obligations of municipalities in the form of those in suit here are placed, by numerous decisions of this court, on the footing of negotiable paper. They are transferable by delivery, and when issued by competent authority, pass into the hands of a bona fide purchaser for value before maturity, freed from any infirmity in their origin." Cromwell v. County of Sac; County of Sac v. Cromwell, 96 U. S. 51, 26 L. Ed. 681.

Requisite of negotiable bonds.

35. (Tenn. 1880.) "In order to make a promissory note or other obligation, for the absolute payment of a sum certain, on a certain day, negotiable, it is not essential that it should in terms be payable to bearer or order. Any other equivalent ex-

pressions demonstrating the intention to make it negotiable will be of equal force and validity. Com. Dig. Merchant, F. 5; 3 Kent Com. § 44, p. 77; Chitty Bills, chap. 5, p. 180 (8th ed.); Bayley Bills, 120 (5th ed.); Story Prom. Notes, § 44. The purpose of the plaintiff in error that the bonds on which the suit is brought should be negotiable is perfectly clear. They are payable to the railroad company or holder if the bond is transferred by the signature of the president of the company." County of Wilson v. National Bank, 103 U. S. 770, 24 L. Ed. 488.

Are negotiable securities.

36. (Iowa, 1885.) "The recital, on their face, that they were issued on the authority of a popular election, held in conformity with a local statute, does not take from them the qualities and incidents of commercial securities. Indeed, the statute evidently contemplated that the bonds issued under its provisions should be negotiable instruments that would do the work of money in financial circles. They are described as 'negotiable bonds' to be used for the purpose of borrowing money to be applied in the erection and completion of school-houses for the district. Its treasurer was directed to negotiate them at not less than their par value, and purchasers were assured by the statute that the indebtedness so incurred 'shall be binding and obligatory on the independent school district, for the use of which said loan shall have been made.'"

"These instruments, although described in the Iowa statute as bonds, have every characteristic of negotiable promissory notes. They are promises in writing to pay, at all events, a fixed sum of money, at a designated time therein limited, to named persons or their order. Upon being indorsed in blank by the original payees, the title passes by mere delivery, precisely as it would had they been made payable to a named person or bearer. After such indorsement, the obligation to pay is to the holder. The decisions of this court are numerous to the effect that municipal bonds, in the customary form, payable to bearer, are commercial securities, possessing the same qualities and incidents that belong to what

are strictly promissory notes negotiable by the law merchant."

Held, also, that their negotiable character was not affected by their being made payable at the pleasure of the district at any time before due. *Ackley School District v. Hall*, 113 U. S. 135, 5 Sup. Ct. Rep. 371, 28 L. Ed. 954.

37. (N. J. 1886.) Bonds issued by a township in New Jersey are negotiable instruments. *New Providence v. Halsey*, 117 U. S. 336, 6 Sup. Ct. Rep. 764, 29 L. Ed. 904.

Bonds issued by county for precinct; payable from tax on property in precinct; obligations of county.

38. (Nebr. 1900.) Bonds issued by boards of county commissioners of counties in Nebraska not under township organization, on behalf of precincts in such counties, are the obligations of the county.

"In legal effect they are the contracts of the county that it will pay the bonds, and the only difference between such bonds and the ordinary bonds of the county is, not the obligation of the county to pay them, but in the method by which the county may raise the money to discharge its own obligations. In the former case it may levy the taxes upon the property in the precinct which voted for their issue; in the latter case, upon all the property in the county. But the obligation of the county to pay them is as sacred and effective in the one case as in the other." *Clapp v. Otoe County, Nebr.*, 45 C. C. A. 579, 104 Fed. 473.

39. (Wis. 1881.) The word "bond" at common law (and even now as a general rule) imports a sealed instrument. *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886.

The term "bond" imports a specialty or sealed instrument.

40. (Mich. 1900.) "The statute under which the instruments purport to have been issued provides for the issuing of bonds. A bond is a deed whereby the obligor obliges himself, his heirs, executors, and administrators to pay a certain sum of money

to another at a day appointed. 1 Bl. Comm. 340. A deed is a writing sealed and delivered by the parties. 2 Bl. Comm. 295. The word 'bond' imports a seal, and the word, when used in a statute authorizing the issue by a municipal corporation of written obligations negotiable in character, means specialties or writings under seal. *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886." *Rondot v. Rogers Tp.*, 39 C. C. A. 462, 99 Fed. 202.

Requisites of negotiable bonds.

40a. (Nebr. 1901.) "To render a written promise to pay money negotiable in the sense of the law merchant, it is essential that it should be an unconditional promise to pay a certain sum of money at some future time, which is sure to arrive, or, as is more frequently said, there must be 'certainty as to the fact of payment.' If by the terms of the contract the sum promised to be paid, or a portion thereof, may never become payable, as where the sum promised is not to be paid unconditionally and at all events, but only out of a special fund derived from certain sources, which may not prove adequate to meet the demand in full, the instrument, according to the great weight of authority, cannot be deemed negotiable, and entitled, in the hands of a third party, to the immunities which belong to that class of instruments."

"They are instruments which merely evidence an obligation on the part of the county to levy a tax of one mill annually on all the property situated within the county, and to apply it to the indebtedness until the same has been fully paid off and discharged. The original holders of the obligations, and all subsequent purchasers thereof, took them with full knowledge of the manner in which the county undertook to pay them, because the method of payment is stated in each obligation, and is an essential part of the contract. The several holders must be regarded as having assumed the risk of the fund proving adequate to pay the debt." *Washington County v. Williams*, 111 Fed. 801, C. C. A.

B. Interest Coupons; Negotiability and Other Incidents.**1. Interest Coupons are Negotiable and are Independent Causes of Action.**

Coupons negotiable independent of bonds.

41. (Ind. 1858.) "A question was made upon the argument, that the suit could not be maintained upon the coupons without the production of the bonds to which they had been attached. But the answer is, that these coupons or warrants for the interest were drawn and executed in the form and mode for the very purpose of separating them from the bond, and thereby dispensing with the necessity of its production at the time of the accruing of each installment of interest, and at the same time to furnish complete evidence of the payment of the interest to the makers of the obligation." The Board of Comrs. of the County of Knox v. Aspinwall et al., 21 How. 539, 16 L. Ed. 208.

Interest coupons are negotiable; holder of them may sue without production of bonds.

42. (Iowa, 1865.) "It is not necessary that the holder of coupons, in order to recover on them, should own the bonds from which they are detached. The coupons are drawn so that they can be separated from the bonds, and, like the bonds, are negotiable; and the owner of them can sue without the production of the bonds to which they were attached, or without being interested in them." Thompson v. Lee County, 3 Wall. 327, 18 L. Ed. 177.

Coupons are negotiable; bear interest after maturity.

43. (Ind. 1868.) "Coupons are written contracts for the payment of a definite sum of money, on a given day, and being drawn and executed in a form and mode for the very purpose that they may be separated from the bonds, it is he'd that they are negotiable, and that a suit may be maintained on them without the necessity of producing the bonds to which they were attached. Interest, as a general rule, is due on a debt from the time that payment is unjustly refused, but a demand is not necessary on a bill or note payable on a given day. Being written contracts for the payment of money, and negotiable because payable to bearer and passing from hand

to hand, as other negotiable instruments, it is quite apparent on general principles that they should draw interest after payment of the principal is unjustly neglected or refused. Where there is a contract to pay money on a day fixed, and the contract is broken, interest, as a general rule, is allowed, and that rule is universal in respect to bills and notes payable on time. Governed by that rule this court in the case of Gelpcke v. Dubuque (1 Wall. 175, 17 L. Ed. 520) held that the plaintiff, in a case entirely analogous, was entitled to recover interest." Aurora City v. West, 7 Wall. 82, 19 L. Ed. 42.

Coupons are negotiable.

44. (Wis. 1869.) "We agree that if this were an action upon the bonds to recover installments of interest that had accrued thereon, although such installments had been duly assigned to the plaintiff, there would be great difficulty in maintaining it in his name, as well as without producing the bonds, as the proper evidence that interest was due. The plaintiff, under such circumstances, doubtless, would have a remedy for withholding the interest; but it is not necessary or material to stop and point it out in the present case; for we do not regard the action as founded upon the bonds, but upon the coupons." "Besides, the coupons are given simply as a convenient mode of obtaining payment of the interest as it becomes due upon the bonds." The City (of Kenosha) v. Lamson, 9 Wall. 477, 19 L. Ed. 725, 730.

Transferable by delivery; subject to same rules as bills of exchange and promissory notes.

45. (Ky. 1871.) "Coupons attached as interest warrants to bonds for the payment of money, lawfully issued by municipal corporations, as well as the bonds to which they are attached, when they are payable to order and are indorsed in blank, or are made payable to bearer, are transferable by delivery and are subject to the same rules and regulations, so far as respects the title and rights of the holder, as negotiable bills of exchange and promissory notes." City of Lex-

ington v. Butler, 14 Wall. 282, 20 L. Ed. 809.

Coupons are negotiable; are independent claims.

46. (Iowa, 1874.) "Coupons, when severed from the bonds to which they were originally attached, are in legal effect equivalent to separate bonds for the different installments of interest. The like action may be brought upon each of them, when they respectively become due, as upon the bond itself when the principal matures; and to each action—to that upon the bond and to each of those upon the coupons—the same limitations must upon principle apply." *Clark v. Iowa City*, 20 Wall. 583, 22 L. Ed. 427.

Statements in coupons as notice of contents of bonds.

47. (Kan. 1876.) "This suit was brought upon coupons detached from the bonds purchased by the plaintiff in error before maturity, but upon their face they refer to the bonds, and purport to be for the semi-annual interest accruing thereon. This puts the purchaser upon inquiry for the bonds, and charges him with notice of all they contain." *McClure v. Township of Oxford*, 94 U. S. 429, 24 L. Ed. 129.

Coupons negotiable; demand when due unnecessary; bear interest after due.

48. (Ill. 1880.) "The form of the coupons does not change their nature. They are evidences of the sums due for interest on the bonds. The fact that they are made payable at a particular place does not make a presentation for payment at that place necessary before a suit can be maintained on them.

"The second and third grounds of objection are answered by the decision of this court in *Clark v. Iowa City*, 20 Wall. 583 (22 L. Ed. 427), where it is said: 'Coupons for installments of interest when severed from bonds are negotiable and pass by delivery. They then cease to be incidents, and become in fact independent claims, and they do not lose their validity if for any cause the bonds are canceled or paid before maturity, nor their negotiable character, nor their ability to support separate actions.' See also *Aurora City v. West*, 7 Wall. 82, 19 L. Ed. 42; *Thompson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177.

"It is next alleged for error that the Circuit Court allowed interest on the coupons sued on to be included in the judgment. The coupons bore interest from the day when they were payable. *Aurora City v. West* (above); *Clark v. Iowa City* (above); *Town of Genoa v. Woodruff*, 92 U. S. 502, 23 L. Ed. 586.

"There is nothing in the act authorizing the issue of the bonds to which the coupons belonged that takes them out of these decisions. And we have been referred to no legislation in the State of Illinois which forbids the allowance of interest on this kind of commercial paper. The failure to present the coupons for payment does not prevent the running of interest. If the town had shown that it had money ready to pay the coupons at the time and place where they were payable, this would have been a defense to the claim for interest. But no such proof was offered, nor was it claimed that the fact existed." *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526.

Interest coupons are independent claims.

49. (Wis. 1881.) Interest coupons "are complete instruments, capable of sustaining separate actions without reference to the maturity or ownership of the bonds."

Limitation of action on interest coupons.

(Wis. 1881.) Interest coupons, being separate causes of action from the bonds, the statutory limitation for commencement of actions thereon begins to run from the time of their maturity. *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886.

Negotiability.

50. (N. Y. 1882.) "It is an immaterial circumstance that the coupons, when purchased by Perrine, were detached from the bonds. And the bonds not having then matured, the coupons, though overdue, had not lost the quality of negotiability by the law merchant." *Thompson v. Perrine*, 106 U. S. 589, 1 Sup. Ct. Rep. 564-568, 27 L. Ed. 298.

Coupons separate causes of action; res adindicata.

51. (Iowa. 1892.) "Each matured coupon is a separable promise, and gives rise to a separate cause of ac-

tion. It may be detached from the bond and sold by itself. Indeed, the title to several matured coupons of the same bond may be in as many different persons and upon each a distinct and separate action be maintained. So, while the promises of the bond and of the coupons in the first instance are upon the same paper, and the coupons are for interest due upon the bond, yet the promise to pay the coupon is as distinct from that to pay the bond, as though the two promises were placed in different instruments, upon different paper." *Nesbit v. Riverside Independent District*, 144 U. S. 610, 12 Sup. Ct. Rep. 746, 36 L. Ed. 562.

Owner of bare legal title may maintain action.

52. (Colo. 1897.) "The plaintiff, by the delivery to him of the coupons and written assignments thereof, became the legal owner of such coupons, and entitled to maintain an action upon them, whether he had actually paid the former owners any consideration for them or not. Holding them by valid written transfers from former bona fide holders for value, he succeeded to all rights of such former holders." *Dudley v. Board of Comrs. of Lake County, Colo.*, 26 C. C. A. 82, 80 Fed. 672.

Coupons prima facie evidence of their own validity.

53. (Nebr. 1899.) "But the coupons were prima facie evidence of their own validity, and required no proof aliunde to sustain them. If they were void because the railroad was not constructed in accordance with the provisions of the statute we have quoted, that was an affirmative defense, which

it was incumbent on the plaintiff to error to plead and to prove if it would avail itself thereof. Contracts of a municipal or quasi-municipal corporation, formerly executed by the officers authorized to do so by law, and not in themselves necessarily beyond the scope of their authority, will, in the absence of proof to the contrary, be presumed to be valid, and to have been made with due authority. If acts were required to be done, or conditions were required to exist, before valid contracts could be made, the contracts themselves raise the presumption and present the evidence that such acts were performed and such conditions existed. Acts done or contracts made by a corporation which presuppose the existence of other acts or conditions in order to make them valid and legally operative are presumptive proof of the latter." A number of cases cited to this proposition. *Grattan Tp. v. Chilton*, 38 C. C. A. 84, 97 Fed. 145.

Recitals in bonds estop maker in an action on interest coupons.

53a. (Iowa, 1901.) "But it is not indispensable to the effectiveness of an estoppel that the acts, words, or deeds which work it shall be contained in a negotiable instrument or in any written contract which is the basis of the action. They are as fatal when found in instruments not negotiable, in writings which are not the basis of the action, when they are mere spoken words, and when they are silent and deceitful acts, as they are when they are contained in a bond or note which is the subject of the action."

(A number of cases are cited to this proposition.) *Independent School District v. Rew*, 111 Fed. 1, C. C. A.

2. Interest Coupons Bear Interest after Due, Generally at Legal Rate where Payable.

54. (Iowa, 1863.) Coupons bear interest after due. *Gelpeke et al. v. The City of Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Aurora City v. West*, 7 Wall. 82, 19 L. Ed. 42.

Coupons bear interest after due.

55. (N. Y. 1875.) In this case, the complaint was made "that the circuit judge decided that the plaintiffs could recover interest upon the cou-

pons from the time they fell due. That ruling was correct and perfectly plain. It was in entire accordance with the decisions generally of the State courts and also of this court." *Town of Genoa v. Woodruff et al.*, 98 U. S. 502, 23 L. Ed. 586.

Interest.

56. (Iowa, 1877.) Interest coupons after maturity bear the rate of inter-

ent provided by the laws of the State in which they were issued. *Cromwell v. County of Sac*; *County of Sac v. Cromwell*, 96 U. S. 51, 26 L. Ed. 681; *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526.

Coupons bear interest at legal rate where payable.

57. (Ill. 1882.) "Lastly, it is assigned for error that, in computing the amount due upon the coupons described in the declaration, the court allowed seven per cent. interest, the legal rate in New York, where the coupons were payable, instead of six per cent., the legal rate in Illinois, where they were made. There was no error in this. The coupons, after their maturity, bore interest at the rate fixed by the law of the place where they were payable. *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520." *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. Rep. 704, 27 L. Ed. 424.

Interest on coupons before judgment; interest on judgment.

58. (Mo. 1889.) "It is objected that there was error in allowing interest at the rate of seven per cent. upon the coupons after their maturity. Such allowance was proper for the reason that the coupons (which, as well as the bonds, were silent as to the rate or interest after maturity) were made payable in New York, where the rate as then established by law was seven per cent." "In respect to interest on the amount for which judgment was rendered, we are of opinion that the law of Missouri governs, and the judgment must bear only six per cent. interest." *Scotland County v. Hill*, 132 U. S. 107, 10 Sup. Ct. Rep. 26, 33 L. Ed. 261.

C. Municipal Warrants and Other Nonnegotiable Evidences of Indebtedness.

62. (Tenn. 1873.) Ordinary warrants, orders, or drafts, drawn by one municipal officer upon another, have not the incidents of commercial paper, though they are transferable by delivery or indorsement. *The Mayor v. Ray*, 19 Wall. 468, 23 L. Ed. 164.

Coupons draw interest at legal rate where payable.

59. (Ill. 1893.) "It is finally objected that the court erred in allowing interest on the coupons. They were made payable in New York, and as such drew interest according to the laws of New York. *Pana v. Bowler*, 107 U. S. 529, 546, 2 Sup. Ct. Rep. 704, 27 L. Ed. 424; *Walnut v. Wade*, 103 U. S. 683, 696, 26 L. Ed. 526." *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. Rep. 803, 37 L. Ed. 673.

In Illinois overdue coupons do not bear interest, in absence of express agreement.

60. (Ill. 1900.) Following the rule of the decisions of the Supreme Court of Illinois that, under the law of that State, interest is recoverable in no case except upon an express agreement to pay it, and can be recovered only when the statute authorizes it, and that general statutory enactments authorizing or requiring the allowance of interest do not apply to the State or to counties, townships, or other municipal bodies, unless it is so expressly provided, this court holds that overdue interest coupons from bonds issued by Saline county, Ill., do not bear interest, in the absence of an express agreement to pay the same. *Graves v. Saline County*, 43 C. C. A. 414, 104 Fed. 61.

Presentation for payment unnecessary; rate of interest.

61. (S. Dak. 1906.) Presentation of coupons for payment at the place designated is unnecessary to a right of action thereon. They draw interest after due and before judgment at the legal rate at place of payment. *Hughes County, S. Dak., v. Livingston*, 43 C. C. A. 541, 104 Fed. 306.

County warrants; evidences of indebtedness; prima facie evidence of validity of debt; transferable by delivery; holder may sue in own name; not negotiable instruments; subject to defenses.

63. (Ark. 1880.) "The warrants in suit are evidences of indebtedness by the county of Monroe, issued by that

branch of its government to which is intrusted, by the laws of the State, the examination and approval of claims against the county. They are orders upon the treasurer of the county to pay out of its funds for county purposes, not otherwise appropriated, the amounts specified. They establish, *prima facie*, the validity of the claims allowed and authorize their payment. But they have no other effect. Their issue determined nothing as to other demands of the payee against the county, or of the county against him. Had there been other claims to be adjusted and settled between the parties, these warrants, if lawfully issued, would have been taken as approved items in the account—nothing more.

"The warrants being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain, in his own name, an action upon them. But they are not negotiable instruments in the sense of the law merchant, so that, when held by a bona fide purchaser, evidence of their invalidity or defenses available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defenses which existed to them in the hands of such payee." *Wall v. County of Monroe*, 103 U. S. 74, 26 L. Ed. 430.

To same effect;

(Ark. 1893.) *Thompson v. Searcy County*; *Searcy County v. Thompson*, 6 C. C. A. 674, 57 Fed. 1037;

(Kan. 1894.) *Board of Comrs. of Hamilton County v. Sherwood*, C. C. A. , 64 Fed. 103.

Warrants; certificates of indebtedness; their character; are not negotiable instruments,

64. (S. Dak. 1899.) Certificates of indebtedness or ordinary warrants, issued by a city, while they establish *prima facie* the validity of the claims allowed, and authorize their payment, have no other effect.

"They are in form negotiable and transferable by delivery, so far as to authorize the holder to maintain in his own name an action on them, but they are not negotiable instruments, in the sense of the law merchant, so that, when held by a bona fide purchaser, evidence of their invalidity or defenses available against the original payee would be excluded." *Watson v. City of Huron*, 38 C. C. A. 264, 97 Fed. 449.

County warrants; presumption of validity.

65. (Kans 1903.) "Presumptively, all of the warrants are valid and represent obligations of the county that had been lawfully contracted. This presumption accompanied the warrants when they were issued, and it is strengthened by the fact that some time after they were issued the county, recognizing them as valid, resolved to fund them into bonds payable to bearer, and did issue bonds in exchange for the warrants, which bonds immediately passed into the hands of innocent purchasers for value. The burden accordingly rests upon the county in this proceeding of showing by convincing proof that the warrants are all void, or, if they were not all void, of showing to what extent the recovery thereon should be reduced because some warrants were issued for a sum in excess of what was justly due from the county to the warrant holder." *Board of Comrs. of Kearny County; Kansas v. Irvine*, 61 C. C. A. 607, 126 Fed. 689.

CHAPTER III.

PURPOSES FOR WHICH MUNICIPAL BONDS MAY BE LAWFULLY ISSUED.

A. Legitimate public purposes.

B. Purposes not public, or prohibited.

The power of the legislature to authorize the levying of taxes, the expenditure of public money, or the incurring of indebtedness by the issuance of negotiable bonds or otherwise, by municipalities, is not unlimited, even when there is no express constitutional inhibition. The exercise of any such power, to be valid, must serve or promote some public purpose, a purpose which, by the policy of the State, is deemed to be a public purpose.

As will be seen elsewhere, there must be express, or clearly implied, legislative authority for the issuance, by a municipality, of its valid negotiable securities for any purpose, but it does not follow that bonds issued for any and all purposes for which the legislature may assume to grant authority would be valid.

Some purposes which are deemed and held to be proper public or municipal purposes in some of the States are unauthorized or prohibited in others, but there are many purposes which, under the Constitutions of all of the States, are considered and treated as essentially municipal and public and which, if not expressly authorized, are permitted by their Constitutions under the general grant of power of legislation for municipal purposes, such as court-houses, jails, and other public buildings, waterworks, sanitary improvements, public roads and streets, cemeteries, parks, and other purposes necessary or highly beneficial in promoting the corporate objects and public welfare.

On the other hand there are some purposes not strictly municipal, which, nevertheless, are generally recognized as public or quasi-public instrumentalities or agencies, and which are permissible objects of the public bounty and favor when not prohibited by the Constitution, on the ground that they contribute directly to the general public convenience and welfare. Of this class are

railroads, canals, wagon roads and other highways, water power, flouring mills, and the improvement and development of natural resources, for the general public benefit.

Municipalities may own, maintain, and carry forward such improvements and works entirely on their own account, or may extend financial aid to private individuals or corporations who may construct or promote and maintain them, when duly empowered by the legislature, in the absence of any constitutional inhibition.

The Constitutions of some of the States expressly prohibit their legislatures from authorizing municipalities to construct or carry on this class of improvements and works, or some of them, or to aid them financially by pledging the corporate credit, levying taxes or otherwise, at the public expense, while in some of the States the exercise of such powers, or some of them, is permitted with prescribed limitations or conditions. A correct understanding of the effect and scope of all such constitutional restrictions is of no less importance than a knowledge of the statutes of the State, both being of vital importance to persons interested in securities issued for any purpose.

Municipal bonds must be paid by taxation, and no enforceable obligation will be incurred by or against a municipality by the issuance of its bonds, though the legislature may have assumed to grant the power to issue them and to levy taxes for their payment, unless by the fundamental law of the State the levy and collection of such taxes, in some form, are permitted.

To the general proposition that municipal bonds, to be valid, must have been issued for an authorized public purpose, there is an exception based upon the rule of equitable estoppel. Though the enabling statutes authorize the issuance of bonds for legitimate public purposes only, a municipality issuing its negotiable bonds purporting to be for an authorized purpose, but, in fact, for an unauthorized purpose, may be bound by its representations of a legal purpose, and may be estopped from denying their legality, after the securities have passed into the hands of bona fide holders for value.

A. Legitimate Public Purposes.

General grant of legislative power gives no authority except for public purposes. right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities, or towns to contract, for private objects, debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist

68. (Mo. 1885.) "The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain, or of the

merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject." *Cole v. La Grange*, 113 U. S. 1, 5 Sup. Ct. Rep. 415, 28 L. Ed. 896.

Railroad aid a public purpose; loan of proceeds of bonds.

67. (Iowa, 1865.) The charter of the city of Burlington authorized the city "to borrow money for any public purpose." Held to authorize the borrowing of money by the city to aid a railroad company in the construction of its railway, on the ground that railways, as a matter of usage, founded on experience, are considered as in the nature of improved highways and indispensable to the public interest and the successful pursuit of business. Such aid may be extended by loaning to the railroad company the proceeds of the bonds. *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79; affirmed in *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350.

Plankroad a public purpose; investing in road company's stock.

68. (Iowa, 1866.) A charter provision empowering a city "to borrow money for any public purpose" authorizes the city to aid in the construction of a plankroad by investing in the plankroad company's stock.

"Plankroads are as much highways as railroads, and if authorized to be constructed by the legislature, they are public improvements. Money borrowed to aid in the construction of such a work by a municipal corporation is borrowed for a public purpose, and if the road leads from, extends to, or passes through the limits of the corporation furnishing the aid, the bonds of the corporation given as the means of raising the money are within the power conferred by that provision." *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350.

Railroad aid a public purpose in Illinois.

69. (Ill. 1872.) "Repeated decisions of the State courts have established the rule that the legislature has the constitutional right to authorize municipal corporations to subscribe for the stock of a railroad company, and

to issue their bonds to aid in the construction of such an intended improvement; that the supervisors of the municipality have the power, in case such a subscription is authorized, to subscribe for the stock of the railroad company, and to call an election to ascertain the will of the legal voters in that behalf. Such corporations are created by the legislature and they derive their powers from the source of their creation, and those powers are at all times subject to the control of the legislature. Everywhere the construction and repair of highways within their limits are regarded as among the usual purposes of their creation, and the expenses of accomplishing those objects are among their usual and ordinary burdens. Railways also, as matter of usage founded on experience, are so far considered by the courts as in the nature of improved highways and as indispensable to the public interest and the successful pursuit, even of local business, that the legislature may authorize the towns and counties of a State through which the railway passes, to borrow money, issue their bonds, subscribe for the stock of the company, or purchase the same to aid the railway company in constructing or completing such a public improvement. Legislation of the kind may be prohibited by a State Constitution, but it is settled everywhere that such an act is not in contravention of any implied limitation of the power of a State to pass laws to promote the usual purposes of municipal corporations." *St. Joseph v. Rogers*, 16 Wall. 644, 21 L. Ed. 328.

Turnpikes, canals, and railroads public purposes.

70. (Neb. 1872.) "That authority given to a municipal corporation to aid in the construction of a turnpike, canal, or railroad is a legitimate exercise of legislative power, unless the power be expressly denied, is not only plain in reason, but it is established by a number and weight of authorities beyond what can be adduced in support of almost any other legal proposition. The highest courts of the States have affirmed it in nearly a hundred decisions, and this court has asserted the same doctrine nearly a score of times. It is no longer open to debate." *Railroad Co. v. County of Otoe*, 16 Wall. 667, 21 L. Ed. 375.

Aid to railroad outside state; donation of bonds.

71. (Neb. 1872.) An act of the legislature of Nebraska authorized the county of Otoe to issue bonds in aid of a railroad outside the State. Held to be a legitimate public purpose in the absence of a constitutional prohibition.

"No one questions that the establishment and maintenance of highways, and the opening facilities for access to markets, are within the province of every State legislature upon which has been conferred general legislative power. These things are necessarily done by law. The State may establish highways or avenues to markets by its own direct action, or it may empower or direct one of its municipal divisions to establish them, or to assist in their construction.

"And that authority given to a municipal corporation to aid in the construction of a turnpike, canal, or railroad is a legitimate exercise of legislative power, unless the power be expressly denied, is not only plain in reason, but it is established by a number and weight of authorities beyond what can be adduced in support of almost any other legal proposition."

The legislature may authorize such aid either by donation of bonds or by subscription to the stock of the railroad company. *Railroad Co. v. County of Otoe*, 16 Wall. 667, 21 L. Ed. 375.

Aid to railroad by donation.

72. (N. Y. 1873.) The legislature may authorize a municipal corporation to aid in the construction of a railroad by donating to the railroad company its negotiable bonds or the proceeds thereof.

"Subscriptions for stock, equally with donations, are outside of the ordinary purposes of such corporations, and the design of both is the same. It is to aid in the construction or maintenance of a public highway. It is for the promotion of a public use. The inducement to a subscription may be greater than the inducement to a donation. In the one case there may be a hope of reimbursement by the stock obtained; in the other there can be no such expectation. In both, however, the warrant for the exercise of the power is the same." *Town of Queensbury v. Culver*, 19 Wall. 83, 22 L. Ed. 100.

Railroads perform public service.

73. (Mich. 1873.) "Where they go they animate the sources of prosperity, and minister to the growth of the cities and towns within the sphere of their influence. Unless prohibited from doing so a municipal corporation has the same power to aid in their construction as to procure water for its water works, coal for its gas works, or gravel for its streets from beyond its territorial limits." *Pine Grove Township v. Talcott*, 19 Wall. 666, 22 L. Ed. 227.

Steam gristmill public purpose; subscription or donation.

74. (Kan. 1876.) A statute authorized the officers of a township to issue bonds "for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water power, by donation thereto or the taking of stock therein, or for other works of internal improvement."

Held, "it is a reasonable construction of this statute to hold that aid to this mill is aid of a public work within its meaning, and that the construction and equipment of a steam gristmill was an internal improvement." *Township of Burlington v. Beasley*, 94 U. S. 310, 24 L. Ed. 161.

Gas works owned by private corporation.

75. (La. 1877.) Bonds were issued by a city to a gas-light company, a private corporation, to aid it in the construction of gas works in the city. It was urged that they were invalid because issued to a private corporation. Held, that they were not invalid on that account.

"A private corporation, as well as individuals, may be employed by a city in the construction of works needed for the health, comfort, and convenience of its citizens; and, though such works may be used by the corporation for its own gain, yet, as they advance the public good, the corporation may be properly aided in their construction by the city; and for that purpose its obligations may be issued, unless some constitutional or legislative provision stands in the way." *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521.

Toll-bridge a public purpose.

76. (Nebr. 1877.) "In approaching the solution of the questions presented

by this certificate, the first inquiry that naturally presents itself is, whether a toll-bridge like that referred to is a public bridge, and hence a work of internal improvement. And we can hardly refrain from expressing surprise that there should be any doubt on the subject. What was the bridge built for, if not fit for public use? Certainly not for the mere purpose of spanning the Platte river as an architectural ornament, however beautiful it may be as a work of art; nor for the private use of the common council and their families; nor even for the exclusive use of the citizens of Fremont. All persons, of whatever place, condition, or quality, are entitled to use it as a public thoroughfare for crossing the river. The fact that they are required to pay toll for its use does not affect the question in the slightest degree." *County Comrs. v. Chandler*, 96 U. S. 205, 24 L. Ed. 625.

Aid to railroad by guaranteeing bonds of company; an authorized purpose.

77. (Ga. 1883.) An act authorized the mayor and aldermen of the city of Savannah "to obtain money on loan on the faith and credit of the city for the purpose of contributing to works of internal improvement." A railroad company issued its negotiable bonds on which the mayor and clerk of the city, in pursuance of directions by the citizens and council thereof, indorsed the city's guaranty of payment of both principal and interest as the same became due according to the tenor thereof.

Held, that this was a legitimate exercise of the power conferred by the statute to obtain money on loan on the faith and credit of the city for the purpose of contributing to works of internal improvement. *City of Savannah v. Kelly*, 108 U. S. 184, 2 Sup. Ct. Rep. 468, 27 L. Ed. 696.

Wagon-bridge; a work of internal improvement.

78. (Nebr. 1884.) A statute of Nebraska empowered counties, cities, and precincts "to borrow money on their bonds or to issue bonds to aid in the construction or completion of works of internal improvement in this State." etc. Held to be legal authority for the construction of a wagon-bridge over the Platte river.

"It is * * * clear that a bridge across the Platte river is a work of internal improvement, for the benefit of the public, and within the scope and terms of the statute of 1869. *County Comrs. v. Chandler*, 96 U. S. 205, 24 L. Ed. 625; *Fremont Building Association v. Sherwin*, 6 Nebr. 48." United States, on the relation of *Chandler, v. County Comrs. of Dodge County*, 110 U. S. 156, 3 Sup. Ct. Rep. 590, 28 L. Ed. 103.

Water power for gristmills purpose.

79. (Nebr. 1884.) Under the statutes of Nebraska, bonds issued by county commissioners on behalf of a precinct within the county, to aid a company in improving the water power of a river for the purpose of propelling public gristmills, are for a public purpose. *Blair v. Cumming County*, 111 U. S. 363, 4 Sup. Ct. Rep. 449, 28 L. Ed. 457.

Bounties to volunteers; a valid purpose.

80. (N. J. 1884.) Bonds issued by a township in pursuance of statutory authority, to raise money for bounties to volunteers in the late Civil war, are valid obligations. *Middleton v. Mullica Township*, 112 U. S. 433, 5 Sup. Ct. Rep. 198, 28 L. Ed. 785.

Railroads a public purpose.

81. (S. Car. 1895.) "To aid in the building of a railroad is a public purpose, and, being for the general welfare of the ordinary municipal corporations, such as counties, cities, and towns, through which the road is to pass, is a corporate purpose, within the meaning of a constitutional provision vesting in the legislature power to authorize municipal corporations to assess and collect taxes 'for corporate purposes.'" *Folsom v. Ninety-six*, 159 U. S. 611, 16 Sup. Ct. Rep. 174, 40 L. Ed. 278.

Irrigation and reclamation of lands a public purpose.

82. (Cal. 1896.) "If it be essential or material for the prosperity of the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condi-

tion of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit. Irrigation is not so different from the reclamation of swamps as to require the application of other and different principles to the case. The fact that in draining swamp lands it is a necessity to drain the lands of all owners which are similarly situated, goes only to the extent of the peculiarity of situation and the kind of land. Some of the swamp lands may not be nearly so wet and worthless as some others, and yet all may be so situated as to be benefited by the reclamation, and whether it is so situated or not must be a question of fact. The same reasoning applies to land which is, to some extent, arid instead of wet." *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369.

Railroad aid a corporate purpose in South Carolina.

83. (S. Car. 1895.) The town of Darlington issued bonds to aid in the construction of a railroad. Held to be a legitimate corporate purpose.

"It is claimed that the court below erred in holding the act (20 S. Car. Stat. at Large, 203) under which the bonds were issued to be constitutional, and it is insisted that the same is void, for the reason that it authorizes the issue of municipal bonds in aid of the construction of a railroad, when such authority, under the Constitution of South Carolina, can only be given for corporate purposes. It is true that such legislation can only be sustained by holding that the construction of a railroad is in aid of the legitimate purposes of a municipal corporation, which, in substance, the court below found, and in which conclusion we concur. The Constitution of South Carolina (art. 9, § 8) au-

thorizes the legislature to permit municipal corporations to assess and collect taxes for corporate purposes, and none other. This question is no longer a doubtful one, as the uncertainties formerly existing relative thereto have been removed by numerous recent decisions of our courts of final resort. The legislature can enlarge the powers of municipal corporations, as was done in the present case; and it may also determine what the corporate purposes are that it has authorized the municipality to exercise. Such a corporation is part and parcel of the governmental power of the State." *Town of Darlington v. Atlantic Trust Co.*, 16 C. C. A. 28, 68 Fed. 840.

Aid to bridge in part beyond corporate limits; a valid purpose.

94. (Minn. 1898.) Bonds issued by the city of South St. Paul to aid in defraying the cost of constructing a railroad and wagon-bridge across the Mississippi river held valid as being for a proper corporate purpose, notwithstanding said bridge was partly outside the corporate limits. *City of South St. Paul v. Lamprecht Bros. Co.*, 31 C. C. A. 585, 88 Fed. 449.

Irrigation canal a work of internal improvement.

85. (Neb. 1902.) The contention was that an irrigation canal intended to take waters from the rivers and lakes was not a work of internal improvement.

"Their argument is that the only ground upon which bonds to aid in the construction of an irrigation canal have been or can be held to have been issued for a public purpose is that they were issued to improve the rivers or water ways of the state from which they derive their water, and that, as the construction of this canal would not improve any of the rivers of Nebraska, the reason of the rule, and therefore the rule itself, cease to operate, and the bonds here in question were issued for a private purpose. The argument is certainly ingenious, but it is not persuasive. Its major premise can neither be conceded nor sustained. The controlling reason

why canals for irrigating purposes are works of internal improvement, and why municipal aid in their construction is for a public, and not for a private, purpose, is not that they improve the rivers or water ways of the states in which they are constructed, but because they redeem waste places, make barren, arid lands fruitful, and thereby increase the actual value of the property and of the products of precincts, towns, and counties far more than the amount of taxes required to assist in their construction. It is the general benefit to the entire property of the community, and not the mere improvement of the rivers or lakes from which the waters of the canals are drawn, that stamps the purpose of their construction as public, rather than private." *Perkins County v. Graff*, 52 C. C. A. 243, 114 Fed. 441.

Canal for irrigation and water power purposes.

86. (Neb. 1902.) "The general proposition may be conceded that a canal is not a work of a public character if the chief purpose of its construction is to create a water power to operate manufacturing plants which are in turn operated wholly for private gain, and in which the public is only incidentally or indirectly interested. *Dodge v. Mission Tp.*, 46 C. C. A. 661, 107 Fed. 827, 54 L. R. A. 242, and cases there cited. We conceive, however, that a water power may be devoted to a public use, as where it is employed to develop electric energy to propel cars or produce light for the public benefit. Possibly the creation of a water power, by means of

a dam and canal, to operate a grist-mill, would, in certain localities and under some conditions, be esteemed a work of such great public utility as to justify an exercise of the power of local taxation in aid of the enterprise. *Burlington Tp. v. Beasley*, 94 U. S. 310, 24 L. Ed. 161; *Guernsey v. Burlington Tp.*, 4 Dill. 372, Fed. Cas. No. 5,855; *Commissioners v. Miller*, 7 Kan. 470, 523, 12 Am. Rep. 425. And it surely can not be maintained, in those arid regions where water must be transported for long distances, not only for the purpose of irrigation, but to render the region habitable, by supplying other public wants, and dams and canals are constructed at great expense for that purpose, that such works lose their public character because a part of the water which they supply is used to generate power for any of the purposes to which power may be lawfully applied. When such works of internal improvement as dams and canals are undertaken in the arid regions, the public is interested in having them built of such dimensions as will supply sufficient water to satisfy all the needs of the community. We are of the opinion, therefore, that the act of the legislature of the state of Nebraska can not be pronounced void upon its face because it declares that a 'canal and other works constructed for irrigation or water power purposes or both are * * * works of internal improvement,' and authorizes public aid to be extended in the construction of such works." *City of Kearney v. Woodruff*, 53 C. C. A. 117, 115 Fed. 90.

B. Purposes not Public, or Prohibited.

Aid to manufacturing concerns not a public purpose.

87. (Kan. 1874.) "In the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufactures, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be

said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally

deserving the aid of the citizens by forced contributions." *Loan Association v. Topeka*, 20 Wall. 655, 22 L. Ed. 455.

Aid to railroads by school township not a corporate purpose.

88. (Ill. 1880.) "Congressional townships under the name of the 'trustee of schools' were incorporated for 'school purposes' only. So the act of incorporation in terms declares. Taxation, by the corporate authorities, therefore, on persons and property within the jurisdiction of such a township, to build railroads, is not taxation for a corporate purpose, and the decree below, which followed the decisions of the State court, was consequently right." *Weightman v. Clark*, 103 U. S. 256, 26 L. Ed. 392.

Steam gristmill not a work of internal improvement in Nebraska.

89. (Nebr. 1882.) "A steam gristmill is not, in our opinion, a work of internal improvement, within the meaning of the act of Nebraska approved February 15, 1869, which authorizes counties, cities, and precincts of organized counties 'to issue bonds to aid in the construction of any railroad or other work of internal improvement.'" *Township of Burlington v. Beasley*, 94 U. S. 310, 24 L. Ed. 161, under the laws of Kansas, distinguished. *Osborne v. County of Adams*, 106 U. S. 181, 3 Sup. Ct. Rep. 150, 27 L. Ed. 835.

Aid to private manufacturing enterprise not a public purpose.

90. (W. Va. 1882.) Bonds were issued by the city of Parkersburg to aid a private manufacturing enterprise.

"But we are of opinion, that, within the principles decided by this court in the case of *Loan Association v. Topeka*, 20 Wall. 655, 22 L. Ed. 455, the bonds in question here are void. The act of 1868 authorizes the bonds to be issued as the bonds of the city. The bonds are to be lent to persons engaged in manufacturing. These persons are to pay the interest on the 'loans' semi-annually to the treas-

urer of the city, and are also to pay annually to the city 5 per cent. of the principal, to go into the sinking fund of the city, till the 'loans' are paid in full. No fund is provided or designated out of which the city is to pay the principal or interest of the bonds. What the 'borrower,' as the act calls him, is to so pay to the city is not such a fund. The city is to pay the principal and interest of the bonds, according to their tenor, whether the 'borrower' pays the city or not. No other source of payment being provided for the city, the implication is that the city is to raise the necessary amount by taxation. It has, by section 15 of the act of March 17, 1860, authority to levy and collect an annual tax on the real estate and personal property and tithables in the city, and upon all other subjects of taxation under the revenue laws of the State, which taxes are to be for the use of the city. A legitimate use of the moneys so raised by taxation is to pay the debts of the city. Taxation to pay the bonds in question is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person.

"There was no provision in the Constitution of West Virginia of 1862 authorizing the levying of taxes to be used to aid private persons in conducting a private manufacturing business. This being so, the legislature had no power to enact the act of 1868." *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. Rep. 442, 27 L. Ed. 238.

Developing water power as natural resources not a corporate purpose.

91. (Ill. 1883.) Bonds were issued by the city of Ottawa under an ordinance submitting to the voters the question whether bonds should be issued "to be expended in developing the natural advantages of the city for manufacturing purposes." The vote was favorable. A subsequent ordinance directed the mayor to issue the bonds and deliver them to a designated person "to be used by him in developing the natural resources and

surroundings of the city, and authorizing and directing him to expend the same in the improvement of the water power upon the Illinois and Fox rivers within the city and in the immediate vicinity thereof," etc. The bonds were intended as a donation to the persons projecting the improvement. Held not to be a corporate purpose.

"In Illinois, under the Constitution of the State, the corporate authorities of cities can not be invested with power to levy and collect taxes except for corporate purposes. This has long been settled. *Weightman v. Clark*, 103 U. S. 250, 20 L. Ed. 392, and numerous Illinois cases there cited. What may be made a corporate purpose is not always easy to decide, but it has never been supposed that if legislative authority had not been granted to a municipal corporation to do a particular thing, that thing could be a purpose of that corporation." *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. Rep. 361, 27 L. Ed. 669.

Private manufacturing enterprise not a public purpose.

92. (Mo. 1885.) Bonds were issued by the city of La Grange to the La Grange Iron & Steel Company, a private manufacturing company. They were held to be void as not being for a public purpose.

"The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument on the subject." *Cole v. La Grange*, 113 U. S. 1, 5 Sup. Ct. Rep. 416, 28 L. Ed. 896.

Law authorizing aid to railroads unconstitutional in Ohio.

93. (Ohio, 1891.) The Constitution of Ohio contains the following provision:

"The general assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint-stock company, corporation, or association whatever; or to raise money for, or loan its credit to or in aid of, any such company, corporation, or association."

"This provision was inserted in the Constitution, and adopted by the people, in view of the fact then and since well known in the history of all States, particularly in the West, that municipal bonds to aid railroads were freely voted in expectation of large resulting benefits, an expectation frequently disappointed. It was a declaration of the deliberate judgment of the people of Ohio that public aid to such quasi-public enterprises was unwise, and should be stopped."

Held, that an act of the general assembly of Ohio of April 9, 1880, purporting to authorize certain townships to build and operate or lease railroads and borrow money, and for that purpose to issue their bonds was repugnant to that provision of the Constitution.

Some decisions of the Supreme Court of Ohio relating to similar legislation reviewed. *Pleasant Township v. Etna Life Ins. Co.*, 138 U. S. 67, 11 Sup. Ct. Rep. 215, 34 L. Ed. 864.

Railroad aid unconstitutional in Ohio.

94. (Ohio, 1894.) The Constitution of Ohio provides (art. 8, § 6): "The general assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint-stock company, corporation, or association whatever; or to raise money for, or loan its credit to or in aid of, any such company, corporation, or association." The legislature passed an act purporting to authorize Pleasant township to issue bonds to construct a railroad across the township.

Similar acts authorized other townships to issue bonds for the same purpose, the intention being to form a consecutive line of railroad to be operated and maintained by a railroad company.

Held, that such legislation and purpose violated that provision of the Constitution and that the bonds were therefore void.

The case of *Walker v. Cincinnati*, 21 Ohio St. 14, distinguished. *Ætna Life*

Ins. Co. v. Pleasant Township, 10 C. C. A. 611, 62 Fed. 718.

Sugar-mills not public purpose.

95. (Kan. 1901.) The erection and operation of sugar-mills is a private and not a public purpose, and bonds issued for such purpose, as well as the statute providing for their issuance, are void. *Dodge v. Mission Tp., Shawnee County, Kan.*, 107 Fed. 827, 46 C. C. A. 661.

CHAPTER IV.

AUTHORITY OR POWER TO ISSUE MUNICIPAL BONDS

- A. Legislative authority necessary; conditions and limitations may be imposed by legislature.
- B. Construction of grants of corporate powers; authority, when implied; incidental powers.
 - 1. Construction of grants of corporate powers; rules of construction; repeal by implication.
 - 2. Authority to issue municipal bonds, when implied; incidental powers.
- C. Irregular or wrongful exercise of power distinguished from absence of authority; noncompliance with constitutional and statutory conditions and limitations.
- D. Powers of de facto public corporate bodies and officers.

From the general rule that public corporate bodies have only such powers as are conferred upon them by the legislature, subject to constitutional restrictions, it follows that negotiable bonds can be legally issued by such bodies only when legislative authority therefor exists, and that such securities, issued without authority of law, are absolutely void. Generally such authority will not be held to exist by implication, but must be granted in express terms, and when not expressly granted, will be implied only when its exercise is incident and necessary to the exercise and enjoyment of powers that have been expressly granted; and any reasonable doubt as to the intention of the legislature to confer such power should be resolved against its existence.

As illustrations of this rule, it has been repeatedly held that express statutory authority, granted to municipal bodies, to construct or carry on, or aid in the construction or promotion, of public improvements or works does not, by implication, authorize the incurring of indebtedness for such purposes, as the purposes and works expressly authorized can be accomplished by the levy and collection of taxes and the appropriation thereto of the same when collected; and the incurring of indebtedness for such purpose, though often convenient or desirable to secure a prompt or

speedy accomplishment of the work, is not necessary to its consummation.

Express authority, given to such bodies, to enter into contracts for the accomplishment of corporate purposes does not necessarily imply authority to incur indebtedness in the nature of general obligations of the bodies, as in such cases the municipality can generally perform the obligations imposed upon it by such contracts by the exercise of the taxing power in advance of, or contemporaneously with, the performance of the contracts by the other contracting parties. In some instances, however, express authority to enter into contracts necessarily requiring the expenditure of considerable amounts of money has been held to imply authority to incur indebtedness in carrying out the contracts, but it has been held also that upon such implication of power to incur indebtedness could not be based the further implication of power to issue negotiable securities as evidences of such indebtedness.

As to whether express authority granted to municipal bodies to borrow money or to otherwise, by contract, incur indebtedness carries with it impliedly the power to issue negotiable securities as legal evidences of such indebtedness the decisions of the courts are not entirely in harmony, but in the absence of decisions to the contrary by the courts of a State construing its own enabling statutes, the Federal courts hold that authority to issue negotiable securities cannot be implied merely from an express grant of power to borrow money or otherwise incur indebtedness; that while in such cases written vouchers or acknowledgments of the debt may be given by the proper official, which would be *prima facie* evidence of the obligation of the corporation, power does not exist in such cases by implication to issue corporate bonds having the properties of negotiable commercial securities unimpeachable in the hands of bona fide holders, on account of equities, defects, or irregularities growing out of their inception and issuance.

In no case will such power be held to exist by implication only, unless it may be clearly implied from the language and purpose of the act. Nor will authority to issue bonds for a purpose not named in the grant be held to be included in an express grant of power to borrow money and issue bonds unless it clearly appears to have been the intention to include it. Authority expressly given to a municipality to borrow money and issue bonds for corporate purposes will not be held to authorize the issuance of bonds to aid in the construction of railroads, or for other quasi-public purposes

not strictly municipal, unless it clearly appears, from the context or otherwise, that such purpose or purposes were intended to be included; nor will authority, expressly granted to a municipal body, to incur indebtedness and issue bonds therefor be held to authorize the issuance of bonds to refund an existing indebtedness. In short, all grants of power to public corporate bodies are construed strictly.

The corporate powers and functions of such public bodies are necessarily exercised by the agency of officers, boards, or other tribunals, selected in the manner provided by law and having such duties and authority, and such only, as the legislature may direct and provide; and any official act or pretended exercise of official power by any such board or officers beyond the authority so conferred is nugatory and void.

Every person contracting with a municipal body is conclusively charged with knowledge of the character and extent of its powers and those of its officers, and of all conditions and limitations imposed by the Constitution or the legislature upon their exercise, and purchasers of municipal securities are as conclusively charged with knowledge of the same matters whether they purchase directly from the municipality issuing them, or buy them in the open market after their issuance.

The legislature in granting any such corporate powers may impose such terms, conditions, or limitations upon its exercise as it may deem proper, subject of course to any constitutional restrictions upon the power of the legislature or the municipal bodies; and generally a substantial compliance with such imposed conditions and limitations is necessary to give validity to negotiable securities issued by such bodies as well as to other corporate acts or contracts; but there is an important exception to this general rule, frequently recognized and applied by the courts in favor of innocent holders of negotiable municipal bonds, based upon the rule of equitable estoppel. Such case arises when a municipal body, having legal authority to issue its negotiable bonds on certain conditions for a specified corporate purpose, issues and places such securities upon the market, purporting and represented to have been issued in compliance with legal requirements and for the authorized purpose, when they were in fact issued to accomplish an unauthorized purpose or scheme, or in violation of, or without complying with, the conditions and limitations prescribed by the enabling statute or the Constitution. In many such cases where bonds have been so illegally or irregularly issued and have

passed into the hands of bona fide purchasers for value in the usual course of business, the corporate bodies issuing them have been held to be bound by their representations of legality and estopped from showing their falsity. The rights of bona fide holders of municipal securities and the application of the rule of estoppel in such cases will be noticed, and the authorities relating especially to that branch of the law of municipal bonds will be found digested and cited in chapter VII of this work.

The authority to make public improvements and for such purposes to enter into contracts and issue bonds in some instances is conferred upon municipal bodies by special mandatory statutes directing and requiring designated boards or officers to execute the power in a specified manner, and in such cases the acts of the boards or officers in issuing the bonds are largely ministerial. In a great majority of instances, however, whether the authority be conferred by special act or by a general law, certain facts and conditions are required to exist and certain acts and things are required to be performed and done before the bonds may be rightfully issued. Among the most usual and important of such precedent conditions is the determination of a public necessity for, or benefit to result from, the proposed improvement or work for which bonds are to be issued, or the submission of the question to a vote of the electors or taxpayers of the body and their approval in accordance with prescribed forms of procedure and a determination of the result of the election, etc. Designated boards or officers are usually charged with the duty of conducting or directing such procedure, and the same boards or officers or others are required to determine whether the necessary facts and conditions exist and whether the requirements of the law have been complied with and the issuance of the bonds has been duly authorized, and to execute and issue them, or direct their execution and issuance, if the determination shall be in favor of such issuance.

It should be remembered that the officers of municipal bodies are the agents and representatives of such bodies and of the people composing them, and that, while they act under delegated and limited authority, within the limits, and to the extent, of such authority their official acts are as binding upon the municipal body and the constituent inhabitants, their principals, as are the acts of other agents within the scope of their agency.

A clearly-defined distinction has been repeatedly recognized by the courts between the absence of legal authority or power of municipal bodies to issue negotiable bonds and the irregular or

wrongful exercise of an existing authority which, in many cases, seems not to have been recognized by those who have contested the validity of such securities on the ground of alleged want of legal authority for their issuance.

Bonds have been issued purporting and represented to be for purposes authorized by law, when the real purpose has been unlawful. This has been accomplished in some cases with the consent of a majority of the taxpayers or electors of the body expressed at an election called and held according to the forms of law, and in other instances the same thing has been accomplished by the independent action of the officers to whom the power to issue the bonds on behalf of the municipal body has been delegated by the law, under the sanction of which they were issued.

In other instances such bonds have been issued for legal purposes, but without compliance with some of the requirements of the law authorizing their issuance.

In a large number of such or similar cases the courts have held that there has been an irregular or wrongful exercise of an existing authority and not an absence of power to issue the bonds. After bonds have been so wrongfully issued and put upon the market and have passed into the hands of innocent purchasers for value, when litigation arises involving the consequences of such irregularities or violations of law, the courts always seek to do justice between the parties by the application of the established rules of law to the facts of the particular case, and such rules and their proper application will be found clearly illustrated in the cases cited in this and other chapters of this work.

The power or authority of a public corporate body to issue bonds or enter into other contracts may depend on its political status, such as the grade or class to which it belongs, the time of its organization or advancement, or other change on which the application to it of particular statutes may depend. The status of a public corporate body is determined in the manner provided by law and is generally shown by some public record prescribed by statute as evidence of such determination, and purchasers of bonds in some cases have been held to be chargeable with knowledge of what such records disclose concerning the right or power of a particular body to issue bonds under particular enabling statutes. If, by the determination, as evidenced by such prescribed record, the authority appears to exist, the municipality assuming to act under such authority will be bound equally with the holder of its obligations by what such record shows to have been so determined,

and irregularities in, or omissions or violations of, legal requirements in the proceedings incident to its organization or change of status preceding such determination will not generally affect the liability of the body to its creditors or their rights against it on contracts entered into and obligations incurred by it while such assumed status exists. A public body may also be bound by its own representation or assumption of a particular status, class, or grade when it has an election in the matter, whether it has complied with prescribed legal forms or not.

A public corporate body, though its organization has been irregular, if its assumed status has been under color of legal authority and has been acquiesced in by the State authorities and the people of the body, has the legal character at least of a corporation *de facto*, and is as fully bound by its acts and contracts within the scope of the legal powers of its assumed class as though it were a corporation *de jure*.

The same rule is applied to municipal officers *de facto*. Their official acts within the powers conferred by law, so far as they concern the public or the rights of third persons who are interested in such acts, are as binding upon the municipal body which they represent as though they were such officers *de jure*.

The Constitution of the United States and those of the several States contain provisions limiting and restricting the powers of the legislatures and municipal bodies of the States which directly or indirectly affect the power of such public bodies to incur indebtedness and levy taxes or assessments for its payment. Such constitutional provisions should not be overlooked when the validity of public securities and the laws purporting to authorize their issuance are under consideration.

Whether, in a given case, there exists legislative permission or authority for a municipal body to levy and collect taxes or assessments for the payment of its obligations is a question of no less importance than that of the authority to issue its bonds.

Some suggestions on the subject of taxation and the authorities relating to that subject will be found in chapter IX.

The subject of this chapter, and especially the questions arising out of the irregular or wrongful exercise of the power of municipal bodies to issue negotiable bonds, are so intimately associated with the matters discussed and the cases digested and cited in chapter VII, relating to the rights of bona fide holders of such securities, as affected by the application of the rule of equitable estoppel,

based upon recitals in the bonds, or on matters of record or otherwise, that an understanding of the subject of either chapter will be greatly facilitated by an examination of both together.

A. Legislative Authority Necessary; Conditions and Limitations May be Imposed by Legislature.

Legislative authority necessary to authorize aid to railroads.

96. (Iowa, 1865.) "A county, or other municipal corporation, has no inherent right of legislation, and cannot subscribe for stock in a public improvement, unless authorized to do so by the legislature. Such a corporation acts wholly under a delegated authority, and can exercise no power which is not in express terms, or by fair implication, conferred upon it. But the legislature of a State, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. And this authority can be conferred in such a manner, that the objects can be attained, either with or without the sanction of the popular vote." *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177.

If no legal authority, bonds void.

97. (Ill. 1872.) "Bonds, payable to bearer, issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are valid commercial instruments; but if issued by such a corporation which possessed no power from the legislature to grant such aid, they are invalid, even in the hands of innocent holders." *St. Joseph v. Rogers*, 16 Wall. 644, 21 L. Ed. 328.

Aid to railroad without vote.

98. (Nebr. 1872.) "If the legislature had power to authorize the county officers to extend aid on behalf of the county or State to a railroad company, as we have seen it had, very plainly it could prescribe the mode in which such aid might be extended, as well as the terms and conditions of the extension, and it needed no assistance from a popular vote of the municipality. Such a vote could not have enlarged legislative power." *Railroad*

Co. v. County of Otoe, 16 Wall. 667, 21 L. Ed. 375.

Power to borrow money legislative.

99. (Tenn. 1873.) The power to borrow money "does not belong to a municipal corporation as an incident to its creation. To be possessed, it must be conferred by legislation, either express or implied."

"There are cases, undoubtedly, in which it is proper and desirable that a limited power of this kind should be conferred, as where some extensive public work is to be performed, the expense of which is beyond the immediate resources of reasonable taxation, and capable of being fairly and justly spread over an extended period of time. Such cases, however, belong to the exercise of legislative discretion, and are to be governed and regulated thereby." *The Mayor v. Ray*, 19 Wall. 468, 23 L. Ed. 164.

Constitutional abrogation of power before performance of conditions voted for.

100. (Ill. 1873.) An act of the legislature of Illinois of March 7, 1867, authorized incorporated towns, cities, and townships acting under the Township Organization Law to appropriate such sums of money as they may deem proper to the C. D. & V. Railroad Company, to aid in construction of the road of said company, to be paid to the company as soon as the track of said road should have been located and constructed through such town, city, or township, respectively, when approved by the vote of a majority of the legal voters thereof at an election on the proposition. Such election was held in the town of Concord, November 20, 1869, resulting in favor of such donation. The new Constitution, which came into operation July 2, 1870, ordained that, "No city, town, township, or other municipality, shall ever become subscribers to the capital stock of any railroad or private corporation, or make donation

to, or loan its credit in aid of, such corporation: Provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions, where the same have been authorized under existing laws, by a vote of the people of such municipalities prior to such adoption." Bonds were issued in pursuance of such vote October 9, 1871. Held, that the bonds were void for want of legal power on October 9, 1871, to issue them, as the Constitution, when it took effect, withdrew the power theretofore existing to make such donation. "This article, in our opinion, makes a clear distinction between subscriptions to the capital stock of a railroad company, or a private corporation, and donations or loans of credit to such corporations. The latter are prohibited under all circumstances. The former may still be made, if they have been authorized by a vote of the people prior to the adoption of the Constitution." This case is distinguished in *County of Moultrie v. Savings Bank*, 92 U. S. 631. *Town of Concord v. Portsmouth Savings Bank*, 92 U. S. 625, 23 L. Ed. 628.

Officers cannot bind municipality without legislative authority.

101. (Kan. 1876.) "A municipality must have legislative authority to subscribe to the capital stock of a bridge company before its officers can bind the body politic to the payment of bonds purporting to be issued on that account." *McClure v. Township of Oxford*, 94 U. S. 429, 24 L. Ed. 129.

Unauthorized bonds in payment of valid contract to construct sidewalks; application of debt limitation; "general purpose."

102. (Tex. 1877.) The mayor and the chairman of the committee on streets and alleys of the city of Galveston, Tex., had been authorized by ordinance to enter into a contract or contracts with responsible parties to fill up, grade, curb, and pave sidewalks, and entered into a contract for such work, agreeing to pay therefor in bonds of the city. This contract was ratified by the council. The city charter conferred upon the council of the city power "to establish, erect, construct, regulate, and keep in repair, bridges, culverts and sewers, side-

walks and crossways, and to regulate the construction and use of the same," and provided for special assessments to be made upon abutting property to pay the cost of construction of sidewalks. The charter further provided that the council should not borrow for general purposes more than \$50,000. The bonds provided for in said contract exceeded this limit. The action was upon the contract and not upon the bonds. Held, that this limitation was upon the power to borrow money for general purposes only and is in no sense a limitation on the debt of the city. Held further, that the purpose indicated in the contract was not a general purpose. Held also, that though there was no authority for issuing bonds for the purpose provided in the contract, the city council was authorized to incur an indebtedness for such purpose. Held also, that said contract was not entirely void and that the contractor was entitled to recover upon the contract. *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659.

Bonds to pay for real estate for courthouse; void for want of provision at time of issue to pay them.

103. (N. J. 1879.) By a law of New Jersey, the expenditures of a county board were restricted to the amount raised by taxation for the fiscal year. The fiscal year commenced December 1st each year, and the amount to be raised in each fiscal year by taxation was to be determined by the county board on July 15th of each year. On December 18, 1876, the county board purchased of one Crampton real estate in Jersey City, upon which to erect a courthouse and other buildings for the county, and paid for the same by issuing to him bonds of the county in the sum of \$150,720, but no provision was made by the board for the payment of the bonds beyond the general declaration that they should be paid out of the amount appropriated and limited for the next fiscal year. The present suit was brought by taxpayers of the county to compel the board to reconvey the land to Crampton and to compel Crampton to return the bonds for cancellation. Held, that the court below very properly rendered a decree for the complainants.

"The object of the statute of New Jersey defining and limiting its (the

board's) powers would be defeated if a debt could be contracted without present provision for its payment in advance of a tax levy, upon a simple declaration that out of the amount to be raised in a future fiscal year it should be paid." *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070.

Bonds issued without authority in payment of county subscription to railroad stock.

104. (Miss. 1880.) The plaintiff, being a holder for value of a large number of coupons from bonds issued by the supervisors of Pontotoc county to the S., M. & M. Railroad Company, brought suit to recover the amount. The court below gave judgment against him as on demurrer to his declaration. "The controlling question in this case is whether there was authority in law for issuing the bonds to which the coupons sued on were attached. If there was not, it has always been held that no recovery can be had in an action on the bonds or coupons. It is also settled that unless the power to issue bonds for the payment of municipal subscriptions to the stock of railroad companies is given in express terms, or by reasonable implication, no obligation of that kind can be created."

On consideration of the special legislation on which this case depends, held, that the issue of the bonds was not authorized and the bonds are void. "On the whole, we think the court below was right in holding that the issue of bonds in this case was not authorized by law. Different questions will arise if the railroad company, or any one who has been subrogated to the rights of the company, shall attempt to enforce the payment of the original subscription by the county." *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122.

Authorized subscription to railroad stock; unauthorized bonds; construction of enabling act; refunding act not applicable; notice.

105. (Mo. 1880.) A statute of Missouri, passed January 4, 1880, incorporating the P., C. & D. M. Railroad Company, provided that if a majority of the taxable inhabitants of any strip of country, not exceeding ten miles on each side of the road, should vote in favor of a subscription to the cap-

ital stock of the company and the levying of a tax upon themselves to pay the same, the County Court should levy and collect such tax and cause the same to be paid, as collected, to the treasurer of the company. Another act, passed March 23, 1868, authorized municipal townships to subscribe to stock of the company on the assent of two-thirds of the qualified voters of the township, and to pay their subscriptions with bonds in the name of the county, payable out of a special tax to be levied on the real estate of the township. March 24, 1870, the act of 1868 was amended, with the evident purpose of permitting bonds to be issued by the County Court to pay for subscriptions to stock made under the act of 1860.

On June 21, 1870, by an order of the County Court, the taxable inhabitants living within a strip five miles on each side of the line of said railroad to be built through the county of Daviess, voted a subscription to the capital stock of the company and the issuance of \$60,000 of bonds, those voting in favor of the subscription being more than a majority but less than two-thirds of the taxable inhabitants, and the bonds were issued by the County Court.

In a suit on interest coupons from said bonds by a bona fide holder thereof, held, that these several acts conferred no authority upon the county board to issue the bonds in question. Held also, that authority to tax for such purpose did not imply or confer authority to issue bonds. Held also, that a statute authorizing counties, cities, or towns to refund their debts did not authorize the issuance of such bonds, as the county did not owe the debt.

"Without doubt, section 7 of the charter of the company authorized the taxable inhabitants of the 'strip of country' designated to vote a tax upon themselves to take stock, and required the County Court to levy and collect such a tax, if voted, and pay over the money as fast as collected to the treasurer of the company; but in this we find no authority for the county to issue bonds in anticipation of the tax. The taxable inhabitants of the strip of country could not themselves make a bond, and all the County Court could do was to collect and pay over the tax that they voted.

The inhabitants were not even organized by themselves, much less made a body politic for any purpose. They could vote the tax, if called upon to do so by the County Court, but that was all."

"We have always held that every holder of a municipal bond is chargeable with notice of the provisions of law by which the issue of his bond was authorized. If there was no law for the issue there can be no valid bond." Ogden v. County of Daviess, 102 U. S. 634, 26 L. Ed. 263.

Constitution prohibiting legislative authorization of municipal aid except upon two-thirds vote; legislative authority necessary; provision not self-executing; election unavailing in absence of legislation.

106. (Mo. 1880.) The Constitution of Missouri contained the following provision: "The general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." Held, that this did not authorize a city to extend aid to a railroad company, but that legislative authority was necessary.

"It is of no importance that two-thirds of the qualified voters of the city gave their assent to the subscription at the election which was called. It has been uniformly held that until the legislature authorizes an election, a vote of the people cannot be taken which will bind the municipality or confer upon the municipal authorities the power to make such a subscription. The legislative authority to obtain the popular assent is as essential to the validity of the election as it is to the subscription." Allen v. Louisiana, 103 U. S. 80, 26 L. Ed. 318.

Railroad aid; authority to subscribe stock; authority to donate bonds; construction of statute; excessive issue of bonds.

107. (Ill. 1881.) A statute of Illinois authorized counties along the line of the D., S. & M. Railroad Company, which included Moultrie county, to subscribe to the stock of that company and issue bonds to an amount not exceeding \$80,000 therefor, and

further authorized Moultrie county to issue its bonds as a donation to the company, when approved by a vote of the people of the county, but provided "that the same shall not be issued until the said road shall be opened for traffic between the city of Decatur and the town of Sullivan, aforesaid." At an election duly held, a majority of votes cast were in favor of a donation by Moultrie county. The county board, December 19, 1869, ordered that the bonds be issued and delivered to the company when the road should be completed through the county. November 1, 1871, the chairman of the board and the clerk of the county issued and delivered the bonds to the company. The bonds recite on their face that they are issued by said county by authority of a vote of a majority of the legal voters of the county, which election was authorized by the act mentioned. The plaintiff in this suit was a bona fide holder of the bonds. Held, in an action on coupons from such bonds, that it was no defense that the county board had issued other bonds to the company on a subscription to its stock, which, with the donation, exceeded \$80,000; that that limitation applied only to subscriptions to capital stock of the railroad company, and not to donations. Held also, that "as there was authority for the issue of the donation bonds, which is recited on their face by reference to the law from which it was derived, the purchaser before maturity was not bound to look further. The county having authority to issue bonds like those purchased by him, he was under no obligation to inquire whether the county had issued more bonds than the law authorized." County of Moultrie v. Fairfield, 105 U. S. 370, 26 L. Ed. 945.

Statutory limit of time for performing official acts.

108. (Mich. 1882.) A statute of Michigan provided that if any township voted aid to railroads, etc., it "Shall, within sixty days after the question of aid is determined by a vote of the electors, * * * issue its coupon bonds for the amount so determined to be granted." "The word 'shall,' as used in the statute, undoubtedly gives the township officers the whole of the sixty days to get the bonds out, but it certainly does not imply that if they fail to do

it voluntarily within the time they cannot be compelled to do so afterward. And if they can be compelled to do so, it necessarily follows that they should do it voluntarily." *Chickaming v. Carpenter*, 106 U. S. 663, 1 Sup. Ct. Rep. 620, 27 L. Ed. 307.

Bonds to aid in developing water power, etc., void.

109. (Ill. 1883.) The city of Ottawa, Ill., was given by its charter the ordinary powers of municipal corporations of its class for local government and was specially authorized "to provide the city with water, to erect hydrants and pumps in the streets for the convenience of its inhabitants," and upon a vote of the people "to borrow money on the credit of the city and to issue bonds therefor and pledge the revenue of the city for the payment thereof." Held, that this did not authorize the issuance of bonds by the city for the purpose of developing or aiding in the development of the natural advantages of its rivers for manufacturing purposes.

"Other bonds of the same issue were involved in *Hackett v. Ottawa*, 99 U. S. 86 (25 L. Ed. 363), and *Ottawa v. First Nat. Bank of Portsmouth*, 105 U. S. 342 (26 L. Ed. 1204), where it was held, in substance, that, as there was legislative authority to issue bonds for municipal purposes, and it was recited in the bonds then sued on that they were issued for such purposes, the city was estopped from proving, as against bona fide holders, that the recitals were untrue." "It is not claimed that express authority was given the city of Ottawa to develop, or aid in developing, the natural advantages of its rivers for manufacturing purposes, and what we are now called on to decide is, not whether, if such a power had been given, it would be within the general scope of the purposes of a city government, and thus a corporate purpose, within the meaning of that term as used in the Constitution, but whether it has been granted by the legislature." *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. Rep. 361, 27 L. Ed. 669.

Bonds to buy depot site to be donated to railroad company; void for want of authority.

110. (La. 1883.) Bonds were issued by the city of Shreveport, La., pur-

porting to have been issued in aid of the T. & P. Railroad Company, but were in fact issued to buy land to be donated to the railroad company as a site for depots, machine shops, etc. There was no power expressly granted to the city for any such purpose, and no such power can be implied from the usual charter authority to purchase and hold property for municipal purposes. Held, that the bonds were void even in the hands of a bona fide holder, whether the people voted for their issuance or not. *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. Rep. 361, 27 L. Ed. 669, reaffirmed. *Lewis v. City of Shreveport*, 108 U. S. 282, 2 Sup. Ct. Rep. 634, 27 L. Ed. 728.

Authority in townships to aid railroad dependent upon action by county; issue of bonds by township, prior to action by county, held unauthorized; recitals in bonds do not aid; doctrine of estoppel discussed.

111. (Ohio, 1884.) The general laws of Ohio authorized county commissioners of counties to subscribe to the capital stock of railroad companies and issue county bonds therefor when sanctioned by popular vote of the electors. The charter of a railroad company provided that, "if the commissioners of any of the counties aforesaid shall not be authorized by the vote as aforesaid to subscribe to the capital stock of said company on behalf of their respective counties, then, and in that case, the question of subscription by township trustees provided for in the same act incorporating said railroad company, shall be submitted to the people of the respective townships, at a special election, to be called as provided for in the first section of this act," and if the proposition be approved by a majority vote a subscription not to exceed \$50,000 might be made by such township. Held, that under these laws a township was without power to make such subscription until the time arrived when it could be properly said that the county as such had not been authorized by a vote of its electors to make a subscription; that such power would come into existence on the failure of the voters of the county to approve a county subscription on submission of the proposition or by a direct refusal of the commissioners to

submit the question of subscription to popular vote, or upon their failure, within a reasonable time, to call an election for that purpose.

Porter township, in Delaware county, issued such bonds to a railroad company, purporting upon their face to have been issued "in pursuance of the provisions of the several acts of the general assembly of the State of Ohio, and of a vote of the qualified electors of said township of Porter, taken in pursuance thereof." Held, that such recitals in municipal bonds did not preclude an inquiry, even when the rights of bona fide holders were involved, as to the existence of legislative authority to issue them.

"We are of opinion that the rule thus stated does not support the position which counsel for plaintiff in error take in the present case. The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a bona fide holder, to question, in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; not merely for themselves, as the ground of their own action, in issuing the bonds, but, equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it. Such is not the case before us. Had the statutes of Ohio conferred upon a township in Delaware county authority to make a subscription to the stock of this company, upon the approval of the voters at an election previously held, then a recital by its proper officers, such as is found in the bonds in suit, would have estopped the township from proving that no election was in fact held, or that the election was not called and conducted in the mode prescribed by law; for in such case it would be clear that the law had referred to the officers of the township not only the ascertainment, but the decision of the facts involved in the mode of exer-

cising the power granted. But in this case, as we have seen, power in townships to subscribe did not come into existence—that is, did not exist—except where the county commissioners had not been authorized to make a subscription."

"Porter township is estopped by the recitals in the bonds from saying that no township election was held, or that it was not called and conducted in the particular mode required by law. But it is not estopped to show that it was without legislative authority to order the election of August 30, 1851, and to issue the bonds in suit. The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals; but the power existing, the municipality may be estopped by recitals to prove irregularities in the exercise of that power; or, when the law prescribes conditions upon the exercise of the power granted, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will also be estopped by recitals which import such performance." *Northern Bank of Toledo v. Porter Township Trustees*, 110 U. S. 608, 4 Sup. Ct. Rep. 254, 28 L. Ed. 258.

Bonds in excess of amount authorized, held void; effect of constitutional provision; necessity for express legislative authorization; certificates by state officers.

112. (Nebr. 1884.) Bonds were issued by Dixon county, Nebr., payable to the C., C. & B. H. Railroad Company or bearer in New York, on January 1, 1896, with interest from January 1, 1876, until paid, as a donation to the railroad company in aid of the construction of its road. The amount of the issue was \$87,000. The assessed value of the taxable property of the county was \$587,331, the bonds being in amount more than 10 per cent. and less than 15 per cent. of such assessed value. The authority relied upon for the issuance of the bonds was an act which took effect February 15, 1869, which was amended February 17, 1875, and which, as amended, required the approval of two-thirds of the votes cast at an election on submission by the county commissioners, and limited the amount to 10 per cent. of the

assessed valuation of all taxable property of the county and required that the proposition of the question of issuing the bonds should be accompanied by a provision to levy a tax annually for the payment of the interest on the bonds as it became due, stating also the rate of interest and the time when the principal and interest should be made payable.

The Constitution of Nebraska, which took effect November 1, 1875, provided as follows: "No city, county, town, precinct, municipality, or other subdivision of the State, shall ever make donations to any railroad or other works of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof, at an election by authority of law; provided, that such donations of a county, with the aggregations of such subdivisions, in the aggregate, shall not exceed 10 per cent. of the assessed valuation of such county; provided further, that any city or county may, by a two-thirds vote, increase such indebtedness 5 per cent. in addition to such 10 per cent., and no bonds or evidences of indebtedness so issued shall be valid unless the same shall have indorsed thereon a certificate signed by the secretary and auditor of the State, showing that the same is issued pursuant to law."

The question of issuing bonds was submitted to the people of the county by a resolution of the county commissioners, dated November 24, 1875, in the following form: "Shall Dixon county issue to the C. C. & Black Hills Railroad Company \$87,000 10 per cent. twenty years' bonds, payable both principal and interest in New York city, and shall a tax be annually levied, in addition to the usual taxes, sufficient to pay the interest as it becomes due, and accumulate a sinking fund to pay the principal at maturity?" and the question was decided by a vote taken December 27, 1875, of 462 votes for it and 120 against it.

There was indorsed upon each bond a certificate of the secretary and auditor of State, dated October 2, 1876, that it was issued pursuant to law, and the further certificate of the auditor of the same date, "that upon the basis of data filed in my office, it appears that the attached bond has been regularly and legally issued by the

county of Dixon to C. C. & B. H. Railroad Company, and said bond, upon presentation thereof by said company, has this day been duly registered in my office in accordance with the provisions of an act entitled 'An act to authorize the registration, collection, and redemption of county bonds, approved February 25, 1875.'" Held, that the bonds were unauthorized by the act of 1869, as amended by the act of February 17, 1875, for the reason that they exceeded in amount the 10 per cent. limitation contained in said acts. Held also, that the above-quoted constitutional provision did not validate said bonds nor confer authority directly upon the county officers to submit a proposition for the issuance of the bonds in an amount exceeding 10 per cent. of the assessed valuation; that notwithstanding such constitutional provision, such bonds, to be valid, must be authorized by the legislature. The case of *Reineman v. C. C., etc., Railroad Company*, 7 Nebr. 310, approved and followed. *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315, 28 L. Ed. 360.

Authority must be express or clearly implied.

113. (Tenn. 1884.) A county had authority to erect a courthouse, but was not authorized to issue bonds in payment therefor. Holding the bonds issued for that purpose to be void, the court say: "Our opinion is that mere political bodies, constituted as counties are, for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it." *Claiborne County v. Brooks*, 111 U. S. 400, 4 Sup. Ct. Rep. 489, 28 L. Ed. 470.

General power or special power to issue bonds.

114. (N. Y. 1885.) "This is not a case where there existed in the board a general power to issue negotiable securities of the county, so that parties would be justified in taking them

when properly executed in form by its officers. It is a case where there was no power, except as specially delegated by law for a particular purpose. All persons taking securities of municipalities having only such special power must see to it that the conditions prescribed for the exercise of the power existed. As an essential preliminary to protection as a bona fide holder, authority to issue them must appear. If such authority did not exist, the doctrine of protection to a bona fide purchaser has no application. This is the rule even with commercial paper purporting to be issued under a delegated authority. The delegation must be first established before the doctrine can come in for consideration. See case of *The Floyd Acceptances*, 7 Wall. 666, 676; *Marsh v. Fulton*, 10 id. 676; *Mayor v. Ray*, 19 id. 468. *Merchants' Bank v. Bergen County*, 115 U. S. 384, 6 Sup. Ct. Rep. 88, 29 L. Ed. 430.

Authority to issue bonds in payment of railroad subscription; limited to amount proposed by commissioners and approved by vote.

115. (Ky. 1886.) "The County Court has no power to subscribe for stock in the railroad corporation, or to issue bonds therefor, except as authorized by statute. The statute authorized the County Court to subscribe for such an amount of stock only, as should be fixed and proposed by the commissioners named in the statute, and be approved by the vote of a majority of the voters of the county; and the authority of the County Court, either to levy taxes or to issue bonds, was limited to the amount so proposed and voted. That amount was \$250,000. The County Court therefore had no authority to issue bonds for a greater amount, and any bonds issued in excess of that amount were unlawful and void." *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. Rep. 897, 29 L. Ed. 1026.

Bonds issued under special act; non-compliance with conditions of; authority of general law invoked; held unavailing.

116. (Kan. 1886.) Bonds were issued by Oxford township, in Kansas, the recitals in which showed that they were issued in reliance upon authority contained in the special act of March

1, 1872, and it appeared on the face of the bonds that the requirements of that act and not those of the general act had been complied with. In a suit on the bonds, the above facts appearing, the plaintiff, a bona fide holder, sought to sustain them on the ground that they were authorized by a general law in force when they were issued. Held, that the bonds could not, under the circumstances, be thus sustained. "He (the plaintiff) was, in the absence of such recitals in the bonds as would protect him, bound by the information open to him in the official records of the officers whose names were signed to the bonds. The recitals in the bonds could not avail him, because, as to the only act recited, that of March 1, 1872, that act was not in force long enough before the election to allow the required notice to be given; and, as to the act of March 2, 1872, the records, which showed proceedings not in conformity with it, and the bonds, by the absence of all reference to it, and by their recitals as to the act of March 1, 1872, excluded the possibility that the town officers issued the bonds, or intended to issue them, under the authority of or in pursuance of the act of March 2, 1872." Several authorities are examined and distinguished. *Crow v. Oxford*, 119 U. S. 215, 7 Sup. Ct. Rep. 180, 30 L. Ed. 388.

Statute in negative and inhibitory terms held not to confer authority; necessity for legislative authority to aid railroads; authority to issue bonds to satisfy indebtedness no authority to issue bonds in aid of railroads.

117. (Tenn. 1888.) The Constitution of Tennessee, adopted in 1870, contained the following provision: "Sec. 29. The general assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes, respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation. But the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city,

or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city, or town become a stockholder with others in any company, association, or corporation, except upon a like election and the assent of a like majority."

An act of the legislature, approved January 23, 1871, contained the following provision: "2d. The credit of no county, city, or town shall be given or loaned to, or in aid of any person, company, association, or corporation, except, first, upon the consent of a majority of the justices of the peace of the county, at a Quarterly Term of the County Court of such county, or a majority of the board of mayor and aldermen, as the case may be, of such city or town, and upon an election afterwards held by the qualified voters of said county, city, or town, and the assent of three-fourths of the votes cast at said election. The said County Court or board of mayor and aldermen, as the case may be, shall spread upon their records the proposition and the amount to be voted upon by the people, and shall have full power to hold and conduct such elections according to the laws regulating elections in this State; and if the assent of three-fourths of the voters of such county, city, or town is had, then the County Court or board of mayor and aldermen, as the case may be, shall have full power to make and execute all necessary orders, bonds, and payments, in order to carry out such loan or credit voted for as prescribed in this act; nor shall any county, city, or town become a stockholder with others in any company, association, or corporation, except upon a like election, and the assent of a like majority, as prescribed in this act." Held, that the enactments in that clause of the statute were entirely inhibitory and negative in their character and conferred no authority for the giving or loaning of credit upon any municipality and conferred no power upon any municipality to become a stockholder with others in any corporation.

"It is well settled that a municipal corporation, in order to exercise the power of becoming a stockholder in a railroad corporation, must have such power expressly conferred upon it by a grant from the legislature; and that even the power to subscribe for such stock does not carry with it the

power to issue negotiable bonds in payment of the subscription, unless the power to issue such bonds is expressly or by reasonable implication conferred by statute." *Pulaski v. Gilmore*, 21 Fed. 870; *Taxpayers of Milan v. Tennessee Cent. Railroad*, 11 Lea, 330, followed.

An act of the legislature of Tennessee, approved March 23, 1872, authorized cities or towns to issue coupon bonds in liquidation and discharge of claims against such cities or towns, and expressly provided that such bonds should "be alone for the purpose of paying outstanding liabilities against the city or corporation issuing them," and that they "shall not in any case exceed the unsettled and matured liabilities or debts of such city or corporation at the time of the issuance thereof." Held, that such statutory provisions did not authorize the issuance of bonds to raise means to aid in the construction of railroads. *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. Rep. 1101, 32 L. Ed. 77.

Railroad aid; bonds payable at time beyond limit fixed by statute, held void.

118. (Tenn. 1888.) An act of Tennessee authorized the town of Dyersburg to subscribe to the capital stock of the M. R. Railroad Company not to exceed \$50,000 in amount, payable in not exceeding four years, by annual assessments levied by the board of trustees of said town and collected as other moneys are, "and bonds of the town may be issued in anticipation of such collections, collected for town purposes." A subsequent act of the legislature provided "that stock which had been subscribed, or may hereafter be subscribed, by any county, city, or incorporation, to said railroad companies may be payable in six annual payments; and it shall be lawful for county courts and the corporate authorities of any city or town making such subscription to issue short bonds bearing interest at the rate of 6 per cent. per annum. to said railroad companies, in anticipation of the collection of annual levies, if thereby the construction of the roads can be facilitated." He'd. that these statutes gave no authority to the town to issue bonds payable in ten years, but only authorized short bonds, to be paid as the assessments were collected. Nor

ton v. Dyersburg, 127 U. S. 160, 8 Sup. Ct. Rep. 1111, 32 L. Ed. 85.

Merrill v. Monticello, 138 U. S. 673, 11 Sup. Ct. Rep. 441, 34 L. Ed. 1069.

No authority to aid railroads except by legislative permission; no implied authority therefrom to execute negotiable bonds.

119. (Mich. 1889.) "By an unbroken current of decisions by this court and by all other courts, too numerous to mention, it is settled law that a municipality has no power to make a contract of this character (aid to railroads), except by legislative permission. It is manifest that, such being the case, the legislature in granting such permission can impose such conditions as it may choose; and even where there is authority to aid a railroad and incur a debt in extending such aid, it is also settled that such power does not carry with it any authority to execute negotiable bonds except subject to the restrictions and directions of the enabling act. *Wells v. Supervisors*, 102 U. S. 625 (26 L. Ed. 122); *Claiborne County v. Brooks*, 111 U. S. 400, 4 Sup. Ct. Rep. 489 (28 L. Ed. 470); *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. Rep. 1101 (32 L. Ed. 77)." *Young v. Clarendon Township* 132 U. S. 340, 10 Sup. Ct. Rep. 107, 33 L. Ed. 356.

Refunding bonds issued without authority; necessity for authority to refund.

120. (Ind. 1891.) There being no statute of Indiana expressly conferring upon incorporated towns a general power to issue negotiable bonds and no statute authorizing the issuance of bonds for refunding or retiring and paying off bonds previously issued, the bonds involved in this suit, being such refunding bonds, were held to be unauthorized and void.

"The town had no power to pay off those bonds in this way, viz.: By the issue of new bonds, or it could perpetuate a debt forever. Bonds once issued for a lawful purpose must be paid by taxation. This is manifest from the provision which requires a tax to be levied each year 'sufficient to pay the annual interest, with an addition of not less than five cents on the hundred dollars to create a sinking fund for the liquidation of the principal.' When bonds are once issued for a lawful purpose, the town is functus officio as to that matter."

Bonds issued in excess of constitutional limitation, void.

121. (Iowa, 1892.) The Constitution of Iowa ordained that "No county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding 5 per centum on the value of the taxable property within such county or corporation—to be ascertained by the last State and county tax lists, previous to the incurring of such indebtedness." Held, that bonds issued by Riverside Independent District in excess of such limitation were void. *Nesbit v. Riverside Independent District*, 144 U. S. 610, 12 Sup. Ct. Rep. 746, 36 L. Ed. 562.

Necessity for legislative authority; railroad aid; legislature may impose conditions; failure to comply with conditions, fatal.

122. (Miss. 1893.) Bonds were issued by the town of Okolona, Mississippi, bearing date September 1, 1871, maturing at from eleven to seventeen years after their date, and reciting that they were "issued and delivered to the Grenada, Houston and Eastern Railroad Company by the town of Okolona, to meet and pay off the amount subscribed by said town to the capital stock of the railroad company aforesaid." The enabling act authorized the issuance of bonds "not to extend beyond ten years from the date of their issuance." On demurrer to the declaration in a suit on sixteen of said bonds, it was urged in support of the demurrer that the bonds were void for the reason that they were payable more than ten years after their execution. Held, that the bonds were void for the reason urged.

"That municipal corporations have no power to issue bonds in aid of a railroad except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds except subject to the restrictions and conditions of the enabling act, are propositions so well settled by frequent decisions

of this court that we need not pause to consider them. *Sheboygan County v. Parker*, 3 Wall. 93, 96 (18 L. Ed. 33); *Wells v. Supervisors*, 102 U. S. 625 (26 L. Ed. 122); *Claiborne County v. Brooks*, 111 U. S. 400 (4 Sup. Ct. Rep. 289, 28 L. Ed. 470); *Young v. Clarendon Township*, 132 U. S. 340, 346 (10 Sup. Ct. Rep. 107, 33 L. Ed. 356). *Barnum v. Okolona*, 148 U. S. 393, 13 Sup. Ct. Rep. 638, 37 L. Ed. 495.

Authority to borrow money for schools; no authority to issue negotiable bonds.

123. (*Nebr.* 1893.) Negotiable bonds were issued November 21, 1874, by School District No. 7, in Valley county, Nebraska, for the purpose of building and furnishing schoolhouses, and contained a recital that they were issued "in pursuance of an act of the legislature of the State of Nebraska, entitled 'An act to establish a system of public instruction for the State of Nebraska,' approved February 15, 1869, and acts amendatory and supplemental thereto." It was contended that the statutes did not confer power to issue negotiable securities and that the bonds were therefore, void. The act of 1869 contained the following provision: "Sec. 30. Any school district shall have power and authority to borrow money to pay for the sites of schoolhouses, and to erect buildings thereon, and to furnish the same, by a vote of a majority of the qualified voters of said district present at any annual meeting or special meeting; provided, that a special meeting for such purpose shall be upon a notice given by the director of such district at least twenty days prior to the day of such meeting, and that the whole debt of any such district at any time, for money thus borrowed, shall not exceed \$5,000." *Laws Nebr.* 1869, pp. 115-120. A subsequent statute, passed February 27, 1873, contained the following provision: "Section 1. That from and after the passage of this law it shall be the duty of the precinct or township and school district boards or officers, after having first filed for record with the county clerk the question of submission, return of votes for and against, notice and proof of publication, to register with the county clerk all precinct or township and school district bonds voted and issued pursuant to * * *

sections 30, 31, and 32 of 'An act to establish a system of public instruction for the State of Nebraska,' approved February 15, 1869. Sec. 3. It shall be the duty of the county clerk on presentation of any precinct or township or school district bonds for registry, to register the same in a book prepared for that purpose." Held, that these provisions did not authorize the school district to issue negotiable bonds, and that the bonds in suit were void even in the hands of bona fide purchasers. *Ashuelot Nat. Bank of Keene v. School District No. 7, Valley County*, 5 C. C. A. 468, 56 Fed. 197.

Constitutional tax limit affecting power to issue bonds.

124. (*Tex.* 1894.) The Constitution of Texas placed a limitation upon the rate of taxation by municipal corporations for making improvements. Bonds were issued by the city of Terrell to raise money to erect a city hall when the city's debt theretofore created required for its payment the full amount of tax that was permitted by the Constitution. Held, that the city hall bonds were void for want of power to issue them. *Millsaps v. City of Terrell*, 8 C. C. A. 554, 60 Fed. 193.

Election; adoption by municipality of provisions of statute; validity of proceedings.

125. (*S. Dak.* 1894.) Article 3, chapter 17 of the Compiled Laws of Dakota, under which the bonds involved in this suit were issued, provided that any organized city may at any time adopt the provisions of this act by a majority vote of the electors. It was silent as to the person or body that should call the election, and as to the notice of such election. Neither said act nor the city charter of the city of Huron required any action on the part of the city council in order to legally call such election. The charter did provide that the city clerk should give at least ten days' notice of the time and place and object of every municipal election, and such notice was given by the clerk. At an election held pursuant to such notice the electors voted and the city council canvassed and declared the vote, and all parties treated it as a valid election until the time came to pay the bonds. Held, that the said article 3 was duly adopted and that the fact

that the city council passed a futile resolution that never took effect, and which was not required, did not invalidate the election. *National Life Ins. Co. of Montpelier v. Board of Education of City of Huron*, 10 C. C. A. 637, 62 Fed. 778.

When bonds may be valid, even in absence of authority to issue.

126. (S. Dak. 1894.) "Recitals in municipal bonds, by the representative body that issues them, to the effect that all the requirements of the laws with reference to their issue have been complied with, * * * may constitute an estoppel in favor of a bona fide purchaser, even where the body that issued the bonds had no power to issue them, and could not, by any act of its own or of its constituent body, make a lawful issue of bonds, if that fact does not appear from the bonds the purchaser buys, the Constitution and statutes under which they are issued, and the public records referred to therein. *Chaffee County v. Potter*, 142 U. S. 355, 12 Sup. Ct. Rep. 216 (35 L. Ed. 1040)." *National Life Ins. Co. of Montpelier v. Board of Education of City of Huron*, 10 C. C. A. 637, 62 Fed. 778.

Favorable vote, when not authorized, does not bind city.

127. (Mich. 1896.) Following the rule in *Allen v. Louisiana*, 103 U. S. 80, it was held in this case that the bonds involved were void for the reason that at the time the election on the question of their issuance was called and held, there was no authority for calling or holding an election on such question; that under the new charter of the city the old official organization had then no power to make submission to the voters of such proposition. *Manhattan Company v. City of Ironwood*, 20 C. C. A. 642, 74 Fed. 535.

Refunding bonds issued without authority; no power to issue refunding bonds as of course, or because municipality is indebted.

128. (Ill. 1897.) Refunding bonds were issued by the city of Oquawka, Ill., in 1871, to compromise and settle an outstanding bonded debt theretofore contracted, while the corporation was, under the laws of the State, an incorporated town. Held, that the

bonds were issued without authority and were invalid, as the act of February 13, 1865, relied upon and recited in the bonds as authority for their issuance, applied only to bonds issued by cities and counties prior to February 13, 1865, when the act was passed, and Oquawka did not become a city until 1871. "Apart from the act of 1865, there was no statute of Illinois, so far as indicated to this court, which authorized, expressly or by necessary implication, negotiable bonds—that is to say, bonds intended to pass as commercial paper from hand to hand on the market, such as those here sued on—to be issued by the city of Oquawka in place of evidences of indebtedness previously existing. Nor does the power to issue renewal or refunding negotiable bonds exist as of course, and merely because a municipal corporation is indebted." *Village of Oquawka v. Graves*, 27 C. C. A. 327, 82 Fed. 568.

County debt limit; invalid indebtedness excluded.

129. (Iowa, 1898.) In computing the indebtedness of a county, outstanding at a time when the bonds in suit were issued, for the purpose of determining whether the constitutional limitation upon indebtedness of the county has been exceeded, bonds previously issued in violation of such provision should not be included and do not constitute a debt of a county. The fact that such void bonds were subsequently paid by the county cannot affect the validity of other bonds issued by the county while such void bonds were outstanding. *Lyon County v. Ashuelot Nat. Bank of Keene, N. H.*, 30 C. C. A. 582, 87 Fed. 137.

Railroad-aid bonds; issued under authority of an act void because not passed as required by the constitution of the state; decision of supreme court of state followed.

130. (N. Car. 1899.) In this action the plaintiff sought to recover judgment against the town of Oxford for the amount of certain interest coupons cut from bonds issued by that town, and to secure the issuance of a writ of mandamus to compel the board of commissioners of the town to levy taxes to pay the plaintiff the amount due it on the coupons.

The general assembly of the State of North Carolina, in 1891, passed an

act to incorporate the Oxford and Coast Line Railroad Company, which act authorized certain counties, cities, towns, and townships to issue bonds to aid in the construction of said railroad. Under said act an election was held April 27, 1891, on the question of issuing \$40,000 of bonds by the town, in pursuance of a petition presented to the board of commissioners March 9, 1891, the election resulting in favor of issuing the bonds. August 4, 1891, the board of commissioners ordered \$40,000 of bonds to be issued, to become due December 1, 1921, payable at the option of the town after ten years. The bonds were to be delivered to the railroad company, for the payment of which certificates of stock in the company were to be issued to the town.

July 14, 1892, the railroad company and one Pruden instituted mandamus proceedings in the State court, stating the foregoing facts and that on February 26, 1892, the railroad company had entered into an agreement with Pruden for the construction of the railroad from Dicherson's station to Oxford, and that the work of construction had been commenced and was progressing; that on May 2, 1892, the board of commissioners of the town adopted a resolution by which they attempted to annul the contract for subscription between the town and the railroad company, and that the mayor of the town had refused to sign an ordinance directing the subscription to be made, and that the commissioners were upholding him in his refusal; that the company desired to perform the contract with Pruden, but was unable to do so because of the refusal of the commissioners to consummate the subscription and issue the bonds. While that case was pending, a compromise agreement was entered into between the parties, by which the town agreed to and did issue \$20,000 of bonds instead of \$40,000 voted, to become due August 1, 1922, purporting, by recitals upon their face, to have been issued in pursuance of said act of 1891 and under said compromise agreement, and, in pursuance of said compromise agreement, at the request of the parties and with their consent, the court entered a judgment in the pending case, embodying the terms of said agreement.

The Union Bank, plaintiff in the present case, on September 12, 1892, purchased in good faith, in the usual course of business, sixteen of said bonds, having no other notice than such as the law implies and as was contained on the face of the bonds, concerning the circumstances of their issuance.

Interest coupons due May 1, 1893, were paid by the town, but coupons maturing thereafter were not paid and the railroad has not yet been built.

The Union Bank, before instituting this suit, had instituted a mandamus proceeding in the State court against the commissioners of the town, for the purpose of compelling the board to levy taxes for the payment of the amount of the interest coupons then due. On appeal to the Supreme Court of the State, that court held in that case that the law was not unconstitutional on the ground urged, that it did not provide for a special election, as the Constitution required, to authorize the issuing of such bonds, as the general laws on the subject, containing provision for elections in such cases, were applicable, and a new trial was granted.

On the second trial in the court below, it was claimed on behalf of the town for the first time that the said act of 1891 had not been passed in compliance with the requirements of the Constitution of the State concerning acts granting power to counties, cities, towns, and townships, that every bill for the purpose shall have passed three separate readings in each house, which readings shall have been on three different days, and that the ayes and nays should be entered on the journal on the second and third readings. It was shown that in the house of representatives the bill passed its second and third readings on the same day, and that the ayes and nays were not entered on the journal on either of said readings. The trial court rendered judgment for the plaintiff and the case was taken to the Supreme Court of the State, which held the act void as not having been properly passed, and that the bonds were absolutely void and incapable of ratification. When the opinion and certificate of the Supreme Court reached the court below, the plaintiff voluntarily submitted to a nonsuit and then

instituted the suit now under consideration, declaring on the same coupons sued on in the State court, with others that had then become due.

The Circuit Court entered judgment for the plaintiff and directed the writ if mandamus to issue as prayed for. Held, pursuant to the decision of the Supreme Court of North Carolina, that the act of 1801, not having been passed according to the requirements of the Constitution, was void; that the act could confer no authority upon the town to issue the bonds, and that the bonds were void. Board of Commissioners of Oxford, N. C., et al., v. Union Bank of Richmond, Va., 37 C. C. A. 493. 96 Fed. 293.

Refunding bonds; void for want of authority.

131. (Cal. 1899.) In this case refunding bonds were held to be void because there was included in the amount thereof an indebtedness of a water-works company, which was a private corporation. There was no authority for refunding such debt by the city. *City of Santa Cruz v. Waite*, 39 C. C. A. 106, 98 Fed. 387. For a statement of this case, see in chap. V, pt. B.

Power to issue bonds cannot be created by recitals in bonds or vote of electors.

132. (N. Car. 1903.) "That the qualified voters of Wilkes county gave their sanction to a subscription to the capital stock of the Northwestern North Carolina Railroad Company; that the bonds in suit are part of those issued in payment of such subscription; that stock was issued to the county to the full amount subscribed; that the road desired by the people of the county was constructed and is in operation; that for many years the county paid interest upon the bonds; and that the plaintiff purchased the bonds in suit for value and in good faith; these propositions are not disputed. However strongly these facts appeal to every one's sense of right and justice, they do not estop the county from raising the question of its power to have made the subscription and issued the bonds in question. We repeat what was said in the former opinion—indeed what had been held in many previous decisions—that if there was an absolute want of power to issue the bonds in question every purchaser of them was charged, in law, with notice of that fact, and could not look to the county in whose name

they were issued. Such power could not be created by mere recitals in the bonds." *Wilkes County v. Coler*, 190 U. S. 107, 23 Sup. Ct. Rep. 738, — L. Ed. —.

Front foot assessment sustained.

133. (Wash. 1904.) "It was within the power of the legislature to create, or to authorize the creation, of special taxing districts, and to charge the cost of a local improvement upon the property in such a district by frontage. *Webster v. Fargo*, 181 U. S. 394; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324; *McNamee v. Tacoma*, 24 Washington, 501, 595; *Cooley*, Const. Lim., 7th ed., 729. The only question of principle, therefore, raised by the inclusion of the planking in the sum of which the plaintiff was to pay his share is whether it was manifestly unfair in this particular case. Taken by itself it looks like an unwarrantable attempt to make one man pay for another man's convenience.

"On the other hand, so far as the work was similar in character, throughout the street, we are of opinion that the improvement might be regarded as one. *Webster v. Fargo*, 181 U. S. 394. See *Lincoln v. Street Commissioners* 170 Massachusetts, 210, 212. And if this be admitted we cannot say that the assessing board might not have been warranted in thinking that substantial justice was done. There were many cuts and fills made in grading the road. So far as appears, the heaviest work may have been done on the plaintiff's land, which seems to have been the summit of an ascent. Improvement of one sort may have been the greatest there, while that of a different kind, needed where the travel was, was at the other end of the street. It is true that the Circuit Judge considered that there was manifest injustice in assessing the plaintiff's land, which was empty and unimproved, by the front foot at the same rate as the improved land lower down and nearer to the bay, and that his opinion naturally carries weight, from his probable acquaintance with the condition of the place. But we do not find a sufficient warrant for it on the record. We must consider how things looked at the time. The owner of the land desired the improvements, if carried out as he wished. The extension of the street helped to bring his land into the market. It was more likely to benefit him than those who were lower down. We cannot invalidate the assessment because the

speculation has failed. Assuming, without deciding, that the question is open to the plaintiff in this proceeding, we are of opinion that the record does not justify interference by injunction on the ground that the assessment was manifestly unfair." *City of Seattle v. Kelleher*, 195 U. S. 351, 25 Sup. Ct. Rep. 44, — L. Ed. —.

Legislature may authorize assessment, after improvement made and paid for by city.

134. (Wash. 1904.) "The answer to the other objections may be made in few words. If, as is said, planking was not authorized under the word "sidewalks" in Ordinance No. 1285, the city has done or adopted the work and presumably has paid for it. At the end the benefit was there, on the ground, at the city's expense. The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say, for a public work already done. *Bellows v. Weeks*, 41 Vermont, 590, 599, 600; *Mills v. Charleton*, 29 Wisconsin, 400, 413; *Hall v. Street Commissioners*, 177 Massachusetts, 434, 439. If this were not so it might be hard to justify reassessments. See *Norwood v. Baker*, 172 U. S. 269, 293; *Williams v. Supervisors of Albany*, 122 U. S. 154; *Frederick v. Seattle*, 13 Washington, 428; *Cline v. Seattle*, 13 Washington, 444; *Bacon v. Seattle*, 15 Washington, 701; *Cooley, Taxation*, 3d ed., 1280. The same answer is sufficient if it be true that when the work was done the cost of planking could not be included in the special assessment, which again depends on the meaning of the words 'sidewalk' and 'pave' in the old charter, section 8, taken with the special provision for planking in section 7. *Laws of 1885-1886*, pp. 238, 241. The charge of planking on the general taxes was not a contract with the landowners, and no more prevented a special assessment being authorized for it later than silence of the laws at the same time as to how it should be paid for would have. In either case the legislature could do as it thought best. Of course, it does not matter that this is called a reassessment. A reassessment may be a new assessment. Whatever the legislature could authorize if it were ordering an assessment for the first time it equally could authorize, notwithstanding a previous invalid attempt to assess. The previous attempt left the city free to take such steps as were with-

in its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property, in any constitutional way. *Norwood v. Baker*, 172 U. S. 269, 293; *McNamee v. Tacoma*, 24 Washington, 591; *Annie Wright Seminary v. Tacoma*, 23 Washington, 109." *City of Seattle v. Kelleher*, 195 U. S. 351, 25 Sup. Ct. Rep. 44, — L. Ed. —.

Grantee bound for assessment equally with grantor.

135. (Wash. 1904.) "We have said enough in our opinion to show that the enforcement of the assessment lien could not be prevented by the original owner. It is urged, however, that a different rule could be applied in favor of one who purchased the land under the circumstances stated above. But the attempt to liken taxation, whether general or special, to the enforcement of a vendor's lien, and thus to introduce the doctrine concerning bona fide purchasers for value, rests on a fallacy similar to that which we have mentioned above, which would deny the right to tax upon an executed consideration. A man cannot get rid of his liability to a tax by buying without notice. See *Tallman v. Janesville*, 17 Wisconsin, 71, 76; *Cooley, Taxation*, 3d ed., 527, 528. Indeed he cannot buy without notice, since the liability is one of the notorious incidents of social life. In this case the road was cut through the plaintiff's land, and, if he had looked, was visible upon the ground. Whether it has been paid for was for him to inquire." *City of Seattle v. Kelleher*, 195 U. S. 351, 25 Sup. Ct. Rep. 44, — L. Ed. —.

Express statutory authority necessary for issuance of negotiable bonds.

136. (Iowa, 1905.) The Iowa Code of 1873, provided as follows: "Loans may be negotiated by any municipal corporation in anticipation of the revenues thereof, but the aggregate amounts of such loans shall not exceed the sum of 3 per cent. upon the taxable property of any city or town."

"This statute, it is observed, authorized the borrowing of money by any municipal corporation, but it did not authorize the issuance or delivery of negotiable bonds as evidence of the loans. The Supreme Courts of the United States and of the State of Iowa have held, and such is now the controlling law, that negotiable bonds

issued by municipalities under such statutes as that just quoted are ultra vires and void, and that, in order to issue bonds or obligations for money borrowed which will circulate in the market as negotiable securities, there must be express statutory authority. *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441, 34 L. Ed. 1069; *Brenham v. German American Bank*, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. Ed. 390; *Barnum v. Okolona*, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. Ed. 495; *Hein v. Lincoln*, 102 Iowa, 69, 71 N. W. 189. See, also, *German Insurance Co. v. City of Manning, Iowa* (C. C.), 95 Fed. 597."

Unauthorized bonds; money obtained thereon may be recovered, when.

"By the provisions of section 471 of the Code of Iowa (1873) power in the abstract is conferred upon cities and incorporated towns of that state to erect or to authorize the erection of water works. By the provisions of section 500 of the same Code, power was conferred upon the municipal corporations of the state to negotiate loans for municipal purposes in anticipation of the revenue. No power was at the time in question conferred upon the municipalities of the state to issue bonds or negotiable securities to evidence such loans. Notwithstanding this want of power to issue negotiable securities, the town, having borrowed of William H. Fernald, pursuant to the power conferred by section 500 of the Iowa Code, the sum of \$2,500, gave to him as evidence of his claim the five certain negotiable bonds in question. These bonds, as already seen, were void for want of power to issue them, but the obligation to pay the loan made pursuant to the power conferred by law was not avoided by the fact that an unwarranted evidence of the loan was executed. Notwithstanding such fact, the money loaned, if used by the municipality for its own benefit, may be recovered. *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659; *Chapman v. County of Douglas*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; *Read v. Plattsburgh*, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414; *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. Ed. 1044; *Geer v. School District No. 11*, 40 C. C. A. 539, 111 Fed. 682, and cases cited."

Action for money when bonds void, limitation of action.

"On the question when the statute begins to run in cases of this kind

we need say but little. This court in two opinions has passed upon what we conceive to be the very question now involved, and has held in substance that when a municipality issues void bonds as evidence of an indebtedness which it had power to incur, for work or property of which it received the benefit and subsequently paid the holder of the bonds interest as it matured according to the tenor of the bonds, the statute of limitations does not begin to run against an action brought to recover the money as long as the municipality recognizes its express obligation to pay the bonds and pays the holder interest thereon according to the requirement of the bonds themselves." *Incorporated Town of Gilman v. Fernald*, 72 C. C. A. 675, 141 Fed. 941.

Municipality purchasing water works subject to mortgage indebtedness. Incurs indebtedness.

137. (Cal. 1913.) The city of Santa Cruz purchased a completed water works system, subject to an indebtedness of the selling company, evidenced by its bonds, secured by mortgage of the water works system, though the city did not expressly agree to pay the mortgage indebtedness.

"The city, by taking over the property by deed under such circumstances, subject to the mortgage made to secure the issue of water bonds, would thereby incur an indebtedness within the inhibition of the statute."

After citing several authorities: "So of other authorities, the general doctrine being that a purchase of what may be termed the equity in property by a municipality subject to a mortgage or bonded indebtedness is the incurring of a municipal debt to the extent of the incumbrance of such property, because the municipality must pay the incumbrance or lose the property. It is not a debt which the municipality can be forced to pay, but it is one which it purposes to pay, and in that sense is a debt inhibited by statutory limitations upon municipal indebtedness. See *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964, 59 Am. St. Rep. 386; *Brown v. City of Corry*, 175 Pa. 528, 34 Atl. 854; *Ironwood Water Works Co. v. City of Ironwood*, 99 Mich. 454, 58 N. W. 371. Nor does it alter the case or impair the effect of the rule that the indebtedness is to be paid out of receipts or income from the property taken over, or from, or is paid in the way of, an annual tax or rentals. *City of Joliet, et al., v.*

Alexander 194 Ill. 457, 62 N. E. 861; *Brown v. City of Corry*, supra; *Earles v. Wells*, supra."

Recitals in bonds; absence of recitals.

"It is settled law that recitals in municipal bonds to the effect that they are issued in pursuance of and in conformity with statutes and ordinances authorizing their issue operate as an estoppel to the municipality to deny that they were so issued."

"On the other hand, if the bonds contain no sufficient recital as to their issuance in conformity with the Constitution, laws, or ordinances, or if the issuance is beyond the power of the municipality to authorize, then it is not estopped to controvert their validity. The doctrine is applicable in cases where bonds have been issued in excess of constitutional or legislative authority. *Township of East Oakland v. Skinner*, 94 U. S. 255, 24 L. Ed. 125; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *School District v. Stone*, 106 U. S. 183, 187, 1 Sup. Ct. 84, 27 L. Ed. 90; *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 300; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132; *Doon Township v. Cummins*, 142 U. S. 306, 12 Sup. Ct. 222, 35 L. Ed. 1044; *Nesbitt v. Riverside Independent District*, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. Ed. 1044.

"The bonds in suit contain no recitation or certification by the municipal or other officers that they were issued in conformity with either the constitution or laws of the state, or with any ordinance of the city authorizing their issue. Indeed, they are not city bonds at all, but bonds of a private corporation containing no certificate whatever as to the regularity or legality of their issuance. Of course, all holders must have notice that the bonds are not primarily obligations of the city. If, therefore, bonds containing no recital or certification to the effect that they were authorized and issued in pursuance of law and the ordinances of the municipality do not estop the municipality to controvert their validity for want of power to authorize their issuance, the obligations being the bonds of the city itself, by how much stronger reason would the municipality not be estopped to controvert the validity of bonds not of its issuance but secured by mortgage upon the city's property, which mortgage as security the city

was without power to authorize or to execute? We think that the city's contention that the plaintiffs are not the owners and holders of these bonds for value and without notice of their infirmity is sound, and that they must be deemed to have taken them with full notice of the want of power in the city to authorize their issuance or to secure the same by mortgage upon its property. But, whether this be so or not, in the view we take of the case, this question relating to the bona fides as it respects the purchase and ownership of these bonds by the present holders becomes practically immaterial."

Contracts ultra vires; relief concerning.

"The appellant's counsel claim, in effect, that the city had no power to accept the deed, and thereby to assume and to obligate itself to discharge the indebtedness evidenced by the bonds and secured by the mortgage of the water company. In other words, the question is presented whether the city was eventually authorized and empowered to incur the indebtedness which it attempted to assume, and thus obligate itself to pay to the holders of the bonds. We have seen that the mode prescribed for incurring indebtedness is also the measure of the municipality's power for so doing. But counsel for appellees strenuously urged that, although the acts of the city in assuming the indebtedness may have been ultra vires, they were not ultra vires in a sense that rendered the transactions absolutely and unalterably void, but that where the contract has been fully executed, the city having received the benefit, it will not be permitted to disavow or abrogate its liability. Let us examine the authorities on the subject."

After citing and noticing a number of authorities the opinion continues: "The principle applies not as an estoppel to the corporation, where the ultra vires contract is still executory, to set up its incapacity to entertain it; but where the contract has been executed—that is, fully and completely performed on both sides—the court will not interpose to restore either party his former estate, or grant other relief, but will leave the parties where it found them. But, however well-established this rule may be, relief will nevertheless be granted if it can be done independently of the contract, or a new, further and independent

consideration subsists in support of the transaction sought to be enforced."

The matter discussed at length.

Refunding water company's debt assumed by city, authorized by electors.

"It is manifest that the election for submitting the refunding project to the electors was not held for the purpose of authorizing the city to incur the indebtedness arising in course of the construction and acquirement of the water works system, but, by the very terms of the ordinance submitting the question, of refunding the bonded indebtedness of the city and issuing bonds for the purpose, and by the plainest language possible the electors sanctioned such indebtedness in so far as the bonds in question are concerned, and thereby, in effect, ratified the action of the city in incurring the same. The vote was in reality upon the question whether the city should pay this indebtedness through a refunding of the same, and it was in effect declared that it should. There could scarcely be a more positive ratification of the acts of the city in incurring the indebtedness, assuming that such indebtedness was in reality that of the city, though incurred beyond its legal authority. It will be noted that the city delayed for a long while, more than three years, the acceptance of the deed from the water works company, after the completion of the water system. Why the delay does not fully appear from the record. But it does appear that the deed which was accepted contains an agreement on the part of the city to assume and pay the indebtedness of the water company, which was wholly, as we have seen, beyond any stipulation contained in the original contract between the city and Coffin & Stanton."

"It may be suggested that the authorization to incur the indebtedness was not in the mode pointed out by the Constitution of the State of California and the statute. To this it may be answered that the mode was at least substantially followed. There was an election by the electors of the city pertaining to the refunding of certain indebtedness, which it was assumed that the city was obligated to pay, or at least ought to pay, and it was declared that such indebtedness should be paid through a refunding of the same. The case of *Bell v. Waynesboro*, 195 Pa. 209, 45 Atl. 930, lends support to this view. It was said in the decision of the court: 'In the

present case we hold that the vote of the 7th of November, 1899, authorizing the town council to create the indebtedness for the express purpose of liquidating this floating debt, which had been irregularly contracted, was such a recognition and ratification of the debt as made it enforceable against the borough. It made valid that which was before illegal.' In that case, as in this, the city authorities had incurred an indebtedness beyond the authority of the borough to incur without the assent of the electors. But the electors could and did ratify the indebtedness thus illegally incurred by authorizing the town council to create an indebtedness for the purpose of liquidating this excess indebtedness."

Could the city lawfully assume the water company's debt? Equitable considerations.

"Now we come to the question whether the city could lawfully undertake and agree to pay this bonded indebtedness of the water company in view of its ultra vires agreement with Coffin & Stanton, whereby it sought to acquire the water works system in the first place. The agreement to assume the remaining indebtedness of the water company was a new and independent contract. The agreement under the Coffin & Stanton contract was simply that the city should take the deed subject to the mortgage securing such water bonds, so that the agreement to assume the mortgage indebtedness is beyond anything contained in that contract, whatever may have been the effect of accepting the deed under the original stipulation. True, the consideration for the enlarged agreement was the acquirement of the water system. But the original contract has been fully executed, and, as was said in *Planters' Bank v. Union Bank*, supra:

"The money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin."

"It is not a question now whether the water bonds were such, evidenced by the city's bonds and warrants, as are authorized for refunding under the act of March 1 1893, but whether the city has through its electors recognized the outstanding water bonds as evidentiary of indebtedness of the city, and thereby in effect authorized the city to assume and pay such in-

debtedness. We think it has. From an equitable point of view the city has acquired this water system and has had the use of it for many years, and it ought not to be heard, after the inhibition for incurring the indebtedness has been removed and the electors have taken action, recognizing the indebtedness here in suit, and in effect ratifying the acts of the city in incurring such indebtedness, to deny its obligation to pay the same under its assumption thereof through acceptance of the deed of the water company to the water system." *City of Santa Cruz v. Wykes, et al.*, — C. C. A. —, 202 Fed. 357.

Issuance of water works bonds; Denver Charter construed.

138. (Colo. 1916.) An amendment to the Charter of the city of Denver contained the following provisions:

Paragraph 1.

"Section 264a. Nothing in the preceding sections or in this charter, except as herein specifically provided, shall apply to the acquisition or operation of a water works for supplying the city and county of Denver and its inhabitants with water for all uses and purposes, but a public utilities commission is hereby created, to consist of three members, to have complete charge and control thereof, and to have and exercise all the powers given to the board of public works in chapter IX, as to all public utilities."

Paragraph 5.

"Upon a vote of the taxpaying electors authorizing the same, as herein after provided, the city and county of Denver, shall and it does hereby authorize the creation of an indebtedness in the sum of eight million dollars to provide a municipal water plant or system and everything incidental or necessary thereto for supplying the city and county and its inhabitants with water for all uses and purposes, said indebtedness to be evidenced by its bonds of the par value of eight million dollars, in convenient denominations of not more than one thousand dollars each and bearing four and one-half per centum interest per annum of such date and in such form maturing at such times as may be prescribed by said commission. The council shall pass such ordinances as said commission may deem necessary respecting the issuance of said bonds or to the full exercise of all the power given it, in the form recommended by the com-

mission, and without amendment, and the mayor shall sign the same. Said commission shall issue said bonds only from time to time as they are required for actual use or sale, and the mayor shall sign them and the clerk shall sign and attest them under the seal of the city, and the auditor shall register them, with the approval of the president of said commission indorsed thereon. No such bonds shall be used or sold at less than par, nor sold except after advertisement as in this charter provided for the sale of public improvement bonds, and they may be called for redemption and redeemed by the commission in like manner as provided in section 314."

Paragraph 6.

"If the Denver Union Water Company shall place in escrow with the Continental Trust Company of Denver, on or before July 1, 1910, a good and sufficient deed of conveyance from said water company to the city and county of Denver for all the property of every description included and embraced in the appraisal made under Ordinance 163, Series of 1907, free and clear of all liens, incumbrances, claims and demands of every kind and character, accompanied by a valid surrender and release of any and all rights, claims and demands said company or any of its subsidiary, associated or affiliated companies may have against the city and county or against any of said property, with direction in writing to deliver the same to said commission in exchange for seven million dollars of said bonds at par, then the commission shall file its acceptance with said trust company and the same shall constitute a binding contract of purchase. In that event then at a special election which the council shall call within sixty days after the adoption of this amendment, to be held on the first Tuesday in September, 1910, there shall be submitted to the qualified taxpaying electors the question of issuing the said eight million dollars in bonds, of which seven million dollars at par shall be delivered to said trust company as aforesaid and the other one million dollars of bonds, or so much thereof as may be deemed necessary, shall be sold or used by the commission to improve, repair and add to the water plant so purchased. The ballot shall have printed on it the words, 'For the issuance of eight million dollars in bonds for the purchase and repair of the existing water plant under the provi-

sions of section 264a of the charter,' and on a separate line the words, 'Against the issuance of eight million dollars in bonds for the purchase and repair of the existing water plant under the provisions of section 264a of the charter,' with a space opposite each such line in which the voter may make his mark indicating his vote."

Paragraph 7.

"In case the Denver Union Water Company shall fail or refuse to fully comply with all the foregoing provisions as to the things to be done and performed by it, then at the special election aforesaid, in lieu of the foregoing question, there shall be submitted to the qualified taxpaying electors on the ballot the question of issuing eight million dollars in bonds to be sold or used to construct and put into operation a complete system of water works for supplying said city and county and the inhabitants thereof with water for all uses and purposes. Said ballot shall have printed on it the words, 'For the issuance of eight million dollars in bonds for the construction of a new municipal water plant,' and on a separate line the words, 'Against the issuance of eight million dollars in bonds for the construction of a new municipal water plant,' with a space opposite each such line in which the voter may make his mark indicating his vote. Such bonds, or so much thereof as the commission may deem necessary, shall be sold or used by it to construct and put into operation a complete system of water works for supplying said city and county and its inhabitants with water for all uses and purposes, and said commission shall forthwith proceed to construct the same."

Paragraph 8.

"The said commission shall immediately upon its election, in case the Denver Union Water Company has not accepted the seven million dollars in bonds for its plant as aforesaid, proceed to make a careful investigation of the value of said plant for the uses and purposes of the city and county of Denver and its inhabitants, and also proceed to make a careful estimate of the cost of constructing a complete new water system for the city and county of Denver and the inhabitants thereof and may submit an alternative bond proposition at said special election for the issuance of bonds in such sum as it may deem advisable for the acquisition or construction of a water plant or any part

thereof by any of the ways within its powers herein mentioned, and the same shall be placed on said ballot in such form as said commission may determine, and it may also submit any proposition concerning its powers or trust at any municipal election in like manner. If a majority of the votes cast thereon shall be in favor of any proposition submitted it shall thereby be adopted, and in case alternative propositions are submitted, and each receive a majority, then the one receiving the greater affirmative vote shall be the one adopted. Such adoption shall be a sufficient authorization for the issuance of the bonds thereby provided for and the same, when issued, shall be and constitute an indebtedness of the city and county of Denver for the purposes aforesaid, and the provisions in this section relative to the issue, sale and redemption of bonds shall apply thereto. Any provisions of the charter in conflict herewith is hereby repealed."

The Denver Union Water Company refused to comply with the foregoing provisions of the charter amendment.

The city council passed an ordinance calling an election on the proposition to issue eight million dollars in bonds of the city for the construction of a new municipal water plant.

The proposition was submitted in the following form: "For the issuance of eight million dollars in bonds for the construction of a new municipal water plant." "Against the issuance of eight million dollars in bonds for the construction of a new municipal water plant." The bonds were authorized by the requisite vote at said election.

This was a taxpayer's suit to enjoin the issuance of the bonds.

"The first and important contention of appellants why the bonds must be declared void may be stated as follows: The city and county and the public utilities commission, hereinafter called commission, are both without power to issue bonds except as specific authority may be conferred in each instance by vote of the qualified taxpaying electors. This authority when conferred must be strictly construed, and all reasonable doubt of its existence must be resolved against the granting of the power. In the case at bar the qualified taxpaying electors authorized the issuance of \$8,000,000 in bonds on condition that they should suffice to provide a municipal water plant or system, and everything incidental or necessary thereto, or construct and put into operation a

complete system of water works for supplying said city and county and the inhabitants thereof with water for all uses and purposes; that the taxpayers have never voted upon the question of issuing \$8,000,000 in bonds to construct a partial or incomplete plant, to finish which and make it usable, would cost a much larger sum, and that to hold that they so voted would sanction a manifest fraud upon the taxpayers. Therefore the issuance of the bonds should be enjoined because upon the record it is admitted that a complete system of water works cannot now be and never could have been constructed for \$8,000,000. In the consideration of this contention we are of the opinion that we must hold on the record before us that a complete system of water works such as would be required to supply the city and county with water, cannot be constructed for \$8,000,000.

"This court, however, possesses only judicial power. It may not legislate nor correct merely unwise legislation or unwise official action. No one can read section 264a without reaching the conclusion that the taxpaying electors understood that \$8,000,000 would construct and put into operation a complete system of water works for supplying the city and county and the inhabitants thereof with water for all uses and purposes. Paragraph 8. But are the bonds voted void because the amount of bonds authorized will not construct and put into operation a complete system of water works? What rule of law has been violated in the estimate made by the electors as to the amount required to construct and put into operation a complete system of water works? What rule of law has been violated conceding the electors made a mistake as to the amount required for the purpose mentioned? It may be conceded that it would be unwise for the commission to start the construction of a water works system with only a part of the expense authorized. But as has been stated the judicial power cannot reach merely unwise official action.

"It would seem to be the duty of the commission or the city and county to go back to the electors for authority to issue additional bonds; but the judicial power does not extend to compelling the performance of official duty where a discretion is involved. It is urged as a legal ground for holding the bonds void, that to decide otherwise would be to sanction a manifest fraud on the taxpayers. We do

not intend to sanction a fraud upon any one, nor do we, when we decide that the evils complained of on this branch of the case are beyond our reach. In order to hold the bonds void for the reason now being discussed, we would be compelled to construe section 264a as providing either directly or by clear implication that the bonds should not be issued or used unless a complete system of water works could be built for \$8,000,000. If this was the idea of the electors it would have been an easy matter to have inserted in the section, language to the effect, that in case it was found that \$8,000,000 would not construct a complete water works system that the bonds should not be issued or used. No such proviso was so inserted, and we have no authority so to do. It certainly cannot be the law that simply because the electors authorizing a bond issue have made a mistake as to the amount of bonds required to construct any public improvement, that therefore the bonds are void, in the absence of any legislation or provision that they shall be void in case the public improvement shall cost more than the amount of bonds authorized. It is rather the exception than the rule that public improvements are built within the limit of the amount of money appropriated therefor."

Conditions precedent to submission to vote.

"It is next contended that by virtue of the language of paragraph 8, section 264a, that the investigation and determination by the commission of the value of the water company's plant, and the cost of constructing a new complete plant, was a condition precedent to be performed prior to the vote, which authorized the issuance of the bonds, and the nonperformance of these duties by the commission rendered the bonds so voted void. In regard to this contention, it is manifest that the failure of the water company to in any way comply with paragraph 6, section 264a, rendered it impossible for the council to submit to the qualified taxpaying electors the question of issuing \$8,000,000 in bonds for the purchase and repair of the water works of the water company. In this condition of affairs there was submitted at a special election called as provided in paragraph 6 the question provided in paragraph 7, and as a result thereof the bonds in question were authorized. The question then

is, was it lawful to submit the question provided for in paragraph 7 at the special election provided for in paragraph 6, or was the commission after the water company had failed and refused to comply with paragraph 6 confined absolutely to the provisions of paragraph 8?

"Section 204a became a law May 17, 1910. By its terms the water company was to place in escrow a good and sufficient deed of conveyance of its water works on or before July 1, 1910. A special election was to be held on the first Tuesday in September, 1910, in case the deed of conveyance of the water company should be deposited in escrow, as above stated, for the purpose of determining whether \$8,000,000 in bonds should be issued to purchase and repair the existing water plant. This question was not submitted at the special election as the water company did not deposit its deed as provided in paragraph 6, but under paragraph 7 in lieu of the question stated in paragraph 6, the question in paragraph 7 was submitted at said special election. The language of paragraph 7 in regard to the submission of the question therein provided for uses the words 'shall be submitted.' Paragraph 8 provides that the commission, in case the water company has not accepted \$7,000,000 for its plant, as provided in paragraph 6, shall proceed to make a careful investigation of the value of said plant for the uses and purposes of the city and county, and its inhabitants, and also proceed to make a careful estimate of the cost of constructing and completing a new water works system for the city and county and the inhabitants thereof, and that said commission may submit an alternative bond proposition at the special election provided for in paragraph 6 for the issuance of bonds in such sum as the commission may deem it advisable for the acquisition or construction of the water plant or any part thereof by any of the ways within its powers.

"In the light of what has transpired it would no doubt have been better had the commission proceeded under paragraph 8, still it could not know before July 1, 1910, whether the water company would accept \$7,000,000 in bonds for its plant, and the time between July 1, 1910, and September 6, 1910, the date of the special election, would in our judgment be entirely insufficient to make a careful investigation of the value of the water company's plant, and of the cost of

constructing and completing a new water system. Indeed, we think that it would have been impossible for the commission to have performed the duties required under paragraph 8 within the time limited. This is demonstrated by the time that it took the engineering committee subsequently appointed to make an investigation of the cost of constructing a new system of water works.

"So far as mere procedure is concerned we think the commission's failure to act under paragraph 8 was justified. And we are also of the opinion that such failure to act in no wise invalidated the election which was actually held. The language of paragraph 7 is mandatory, and the question upon which the qualified electors were to vote was clearly defined."

"It is further claimed that, whether the commission was obliged to follow paragraph 8 or not the failure to make a careful estimate of the cost of constructing a new system of water works prior to the special election at which \$8,000,000 in bonds were authorized renders the vote nugatory."

The case of *Carlson v. City of Helena*, 39 Mont. 82, 102 Pac. 39, 17 Ann. Cas. 1233, noticed.

"There can be no question in this case that the submission of the question voted upon to the qualified tax-paying electors in any way interfered with the discretion of the commission or the council of the city and county as to where the supply of water should be obtained, so the case cited is inapplicable on that point. The case, however, does seem to hold that it was necessary for the council of the city of Helena, Montana, before it submitted the bond proposition to a vote of the taxpayers, to have ascertained whether or not a water supply and water system could be obtained and constructed for the sum of \$600,000; and one of the grounds upon which the court seems to have held the bonds void was that the council never did ascertain prior to the vote what a water system for the city of Helena would cost. We all must admit that that would be the business way of going about the matter, but where, as in the case at bar, the charter authorizes the creation of an indebtedness in the sum of \$8,000,000 to provide a municipal water plant or system and everything incidental or necessary thereto for supplying the city and county and all its inhabitants with water for all uses and purposes upon a vote of the taxpaying electors, and the charter further provides that

the question shall be submitted as provided in paragraph 6 of 264a, we can not conclude that the mere failure of the commission to ascertain the probable cost of a new system would render the vote provided by law nugatory. In our judgment section 264a left it to the discretion of the commission whether it should follow paragraph 7 or paragraph 8."

Fixing date, form and maturity of bonds.

"It is further contended that the commission failed and neglected to fix the date, form and maturity of the \$8,000,000 of bonds prior to the special election of September 6, 1910, and that, therefore, the commission has no power to issue the same. It appears that by the ordinance effective January 15, 1914, the council of the city and county fixed the form and date of the bonds. They were to bear date January 1, 1914, and all the installments of said bonds were to mature not later than thirty years from the date of original issue, and all of the bonds should absolutely mature and be payable thirty years after their date. It also appears from the record that while litigation did not prevent the commission from fixing the form, date, and maturity of the bonds prior to the special election, it did cause the delay to a large extent which happened subsequently thereto.

"Paragraph 5 of 264a empowers the commission to fix the date, form, and maturity of the bonds without any limitation as to the time it should so do. The taxpaying electors must be charged with a knowledge of this law, and when they voted the bonds they did so charged with such knowledge. The question submitted to the taxpaying electors was the question the law required to be submitted to them and that was sufficient."

"It is also contended that the public utilities commission has no authority under section 264a to issue what is termed 'straight, flat, thirty-year bonds,' but they were to issue only 'call bonds,' and that in any event it was the mandatory duty of the commission to determine whether said bonds were to be straight, flat bonds or call bonds prior to the special election. Paragraph 5 of section 264a provides:

"No such bonds shall be used or sold at less than par, nor sold except after advertisement as in this charter provided for the sale of public improvement bonds, and they may

be called for redemption by the commission in like manner as provided in section 314."

"It is conceded that the commission under the grant of power to say at what time the bonds should mature would have the right to issue straight, flat, thirty year bonds. But it is claimed that the language last quoted restricts and limits the power of the commission in some way so as to deprive them of their authority to issue straight, flat, thirty-year bonds. We do not think so, and consider the reasoning to the contrary highly technical. It is insisted, however, that in any event it was the mandatory duty of the commission to determine whether the bonds were to be straight, flat, thirty-year bonds or call bonds prior to said election, and to inform the taxpayers thereof. As we have said before there are many things that the commission might have done, but we think it is enough to require them to do what the law commanded, and we find no command in the law for informing the taxpayers of whether the bonds would be straight, flat, thirty-year bonds or call bonds."

Provision for sinking fund.

"Section 6 of Ordinance No. 4, Series of 1914, provides for a tax upon all taxable property in the city and county sufficient to pay the annual interest on said bonds, and to provide a sinking fund to extinguish the principal of said bonds at their maturity.

"Section 7 of said ordinance provides that when the water plant or system shall have been constructed that the revenue derived from the operation of said water plant or system, or so much thereof as is not actually needed for the operation and maintenance of the said water plant or system, shall be paid into the treasury of the said city and county for the purpose of creating a sinking fund to extinguish the principal and interest of the said bonds within the said period of thirty years, and that whenever there is any money so paid into the treasury of the city and county from the revenues of the said water plant, then and in that event and until said sums of money are exhausted, no part of the levy provided for in this connection to be levied upon the taxable property of the city and county, shall be utilized in the extinguishment of the principal and interest of said bonds.

"It is now contended that the law only authorized the commission to

provide for a sinking fund to be created out of the net earnings derived from the operation of the water plant when constructed; and sections 258, 261, and 263 of article 9 of the charter are cited in support of this contention. We infer from the language of the ordinance that it was the intention of the commission and council to make such a provision for a sinking fund as would render it certain that the bonds with interest would be paid. The ordinance does provide a sinking fund to be paid out of a net revenue arising from the operation of the water works system; and it further provides that no part of the levy provided for in section 6 to be levied upon taxable property of the city and county, shall be used where there is sufficient income arising from net revenue.

"It is claimed also that the commission ought to have stated in the proposition submitted to the vote of the taxpaying electors how it proposed to create a sinking fund for the payment of the principal and interest of the bonds. So far as submitting the proposition to the electors is concerned the law did not require it, and we may not say the bonds are void, because something was not submitted to the taxpaying electors that the law did not provide should be submitted. Nor can we hold the bonds invalid merely because the commission and council have made a provision for a sinking fund that may not have been necessary. Any irregularity in this respect can be easily corrected by the commission and council." *Wheeler, et al., v. City and County of Denver, et al.*, — C. C. A. —, 231 Fed. 8.

B. Construction of Grants of Corporate Powers; Authority, when Implied; Incidental Powers.

1. Construction of Grants of Corporate Powers; Rules of Construction; Repeal by Implication.

Construction of acts of incorporation.

139. (Pa. 1860.) "Now we freely subscribe to the rule that neither privileges, powers, nor authority can pass by an act of incorporation, unless they be given in unambiguous words, and that an act giving special privileges must be construed strictly. That in such a case, where a sentence is capable of having two distinct meanings, that a construction must be given to it most favorable to the public. But in applying these principles to this case, it must be done with reference to the subject-matter contemplated by the legislature as a whole." *Jacob E. Curtis, Plaintiff, v. The County of Butler*, 24 How. 435, 16 L. Ed. 745.

Enabling acts and corporate contracts, how construed.

140. (Ind. 1862.) "The object of this court has been, in cases of a like kind, and it is still its purpose, to give to the contracts of counties for the purchase of railroad stocks and for borrowing money, to aid in the construction of railroads and other internal improvements, a strict interpretation of the legislative acts empowering them to do one or the other; but at the same time to give protection to the bona fide holders of such contracts as have been put on sale in the money market, by corporations or by counties acting corporately, against

their efforts to be relieved from the responsibilities of official acts, in putting such paper into circulation, for capitalists to invest money in them, on assurance that the principal and interest would be paid accordingly. We repeat now, as appropriate to the subject-matter of the case in hand as it was in the case in which this court said it, 'that corporations are as strongly bound as individuals are to a careful adherence to truth in their dealings with mankind, and that they cannot by their representations or silence involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced.' An act giving special privileges must be construed strictly. That, in case a sentence is capable of having two meanings, a construction must be given favorable to the public. However, that, in applying those principles of construction, it must be done with reference to the subject-matter contemplated by the legislature as a whole, so as not to allow its manifest purpose and design to be defeated by denying the use of means by which the main object could only be accomplished." *Moran v. Miami County Comrs.*, 2 Black, 722, 17 L. Ed. 342.

Construction of grant of power.

141. (Ind. 1863.) The grant of authority, "To take stock in any char-

tered company for making road or roads to said city," does not limit the taking of stock in companies whose lines come within the city. *Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538.

"May" sometimes means "must."

142. (Ill. 1866.) A statute of Illinois declared that "The board of supervisors, under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, may, if deemed advisable, levy a special tax, not to exceed in any one year 1 per cent. upon the taxable property of any such county." Held, that this language though in form permissive was peremptory. "The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.' The line which separates this class of cases from those which involve the exercise of a discretion, judicial in its nature, which courts cannot control, is too obvious to require remark. This case clearly does not fall within the latter category." *Supervisors v. United States ex rel.*, 4 Wall. 435, 18 L. Ed. 419; *City of Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560.

143. (Ill. 1866.) "Repeal by implication, when the prior and latter act can consistently stand together, is never admitted." *City of Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560.

144. (Ill. 1872.) "Majority of the legal voters of the township," interpreted to mean only a majority of the legal voters of the township voting at the election. *St. Joseph v. Rogers*, 16 Wall. 644, 21 L. Ed. 328.

Difference between mandatory and enabling statutes; railroad aid; constitutionality.

145 (N. Y. 1873.) "It may be that a mandatory statute requiring a municipal corporation to subscribe for stock in a railroad company, or to contribute to the construction of the railroad of such a company, is not a legitimate exercise of legislative power, and that it is not even an act of legislation. This was decided by the Court of Appeals of New York in the case of *The People ex rel. v. Bacher* (8 Alb. L. J. 120). But the present is no such case. The legislative act by which the town of Queensbury was authorized to issue bonds in aid of the railroad from the village of Glens Falls to intersect with the Saratoga and Whitehall railroad was not mandatory. It was merely enabling. It authorized the issue and donation of the bonds, if approved by a popular vote. It was a mere grant of power upon conditions, coupled with a prescription of the mode in which the power granted might be exercised. And that it was a constitutional exertion of legislative power must be considered as settled affirmatively by the decisions of this court in *Railroad Co. v. The County of Otsego* (16 Wall. 667, 21 L. Ed. 375), and *Olcott v. The Supervisors of Fond du Lac County* (16 Wall. 678, 18 L. Ed. 560)." *Town of Queensbury v. Culver*, 19 Wall. 83, 22 L. Ed. 100.

Subscription to railroad stock on behalf of township; construction of statute.

146. (Ill. 1876.) Action to recover the amount of certain interest coupons issued with certain bonds by Charles Clement, supervisor and agent of East Oakland township, upon a subscription to the stock of the P. & D. Railroad Company. The assumed, and only, authority for such bonds was "An act to incorporate the Paris and Decatur Railroad Company," approved February 18, 1861. Said act required the railroad company to give thirty days' notice by publication of the opening of books for subscription to the capital stock thereof, and provided that "it shall be lawful for all persons of lawful age or for the agent of any corporate body, to subscribe any amount to the capital stock of said company." Held, that said act conferred no power on

municipal corporations to subscribe for such stock and that the provision referred to private corporations when it authorized agents to subscribe, and does not refer to counties, cities, towns, or townships, and cannot be held to embrace them.

"We have held that a town cannot subscribe for stock in a railroad corporation unless it has the authority of the legislature for the act. The legislature usually requires the approval of the electors of the town, at an election for that purpose, as a condition to such subscription. Doubtless, the legislature can impose or omit conditions, in its discretion. But when the sanction of a popular vote is required, it must be obtained." *Township of East Oakland v. Skinner*, 94 U. S. 255, 24 L. Ed. 125.

"To borrow money for any object," etc., authorizing railroad aid.

147. (Iowa, 1863.) The charter of the city of Muscatine authorized the city "To borrow money for any object in its discretion, if at a regularly notified meeting under a notice stating distinctly the nature and object of the loan, and the amount thereof, as nearly as practicable, the citizens determine in favor of the loan, by a majority of two-thirds of the votes given at the election." Held, that this provision conferred power on the city to issue bonds to aid in the construction of railroads. *Meyer v. City of Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *Comrs. of Marion County v. Clark*, 94 U. S. 278 (284), 24 L. Ed. 59.

Depots and side tracks incident to railroad.

148. (Kan. 1877.) In the grant of power to aid in the construction of railroads or other works of internal improvement is included authority for the construction of depots and side tracks of a railroad.

"Such constructions are constituents,—essential parts of every railroad, without which it would be incomplete and incapable of serving the uses for which it is intended. The cost of building them is always, and properly, charged to construction account, and not to repairs or expenses of operation; and a mortgage of a railroad, without further description than such is necessary to identify it, covers its side tracks and de-

pots." *Township of Rock Creek v. Strong*, 96 U. S. 271, 24 L. Ed. 815.

Proposition to voters for issuance of bonds may be submitted more than once.

149. (Miss. 1878.) There being nothing in the enabling act indicating the intention of the legislature to the contrary, a proposition to issue the bonds once defeated by the electors may again be submitted for their approval. *Supervisors v. Galbraith*, 99 U. S. 214, 25 L. Ed. 410.

Act providing that bonds issued under it should not be invalid because of errors in calling election, canvass or return of votes, or signing of bonds.

150. (Ill. 1879.) A statute of Illinois, approved March 6, 1867, authorizing townships to subscribe to the capital stock of railroads, provided for the calling of elections to vote upon the question of making such subscription and issuing bonds therefor on the application of twenty legal voters of the township, and required twenty days' notice of the election to be given. Section 5 of the statute declared that "no mistake in the giving of the notice, or in the canvass or return of votes, or in the issuing of the bonds, shall in any way invalidate the said bonds so issued; provided, that there is a majority of the voters at such election in favor of such subscription." An election was called by the clerk of Roberts township on an application signed by only twelve legal voters, and was held after but ten days' notice. It was urged that the provisions of said section 5 of said act violated the Constitution of Illinois.

"We do not, however, feel justified in declaring that provision of the act to be in conflict with that instrument. We are referred to no decision of the State court which so decides."

"Certainly the legislature could prescribe the mode of ascertaining the sense of the voters, who alone, it is claimed, were the corporate authorities of the town, within the meaning of the State Constitution. And as it might, in the act of March 6, 1867, have allowed the election to be called upon the application of a less number of voters and taxpayers than twenty, and to be held after a notice of ten

days, rather than twenty, we do not see any ground to question its right, consistently with the State Constitution, to declare, in advance, that if the majority of voters at the election favor the subscription, the bonds issued in payment thereof should not be invalidated by mistakes of the kind specified in the fifth section of that act." *Roberts v. Bolles*, 101 U. S. 119, 25 L. Ed. 880.

Act requiring registration of bonds by counties, cities, and towns construed; extends to township bonds issued by county courts.

151. (Mo. 1879.) Bonds issued by County Courts in Missouri on account of subscriptions by townships in such counties, to the capital stock of railroad companies under the Township Aid Act of Missouri, are required to be registered by the auditor of the State under the provisions of the act of said State, entitled "An act to provide for the registration of bonds issued by counties, cities, and incorporated towns, and to limit the issue thereof."

"While the bonds are township bonds in the sense that they are payable out of taxes levied on the property in the township which voted them, they were issued by the county."

"The act in question is not confined to the bonds of counties, but embraces all issued by counties."

"The object of the new legislation undoubtedly was to guard against unauthorized issues of this class of public securities. For this purpose, a new policy was adopted by the State. The evil which the general assembly had in view affected township bonds as well as those of counties, cities, or towns." *Anthony v. County of Jasper*, 101 U. S. 693, 25 L. Ed. 1005.

Rule of construction; effect should be given to whole.

152. (Mo. 1880.) "In the construction of a statute, every word is, if possible, to be given some effect. Nothing is to be stricken out if it can be avoided. It is not to be presumed that the legislature intended any part to be without meaning." *Allen v. Louisiana*, 103 U. S. 80, 26 L. Ed. 318.

Ambiguous statute; all parts to be given effect if possible.

153. (Ill. 1881.) When the purpose of the different provisions of a statute,

taken together, is ambiguous or doubtful, such construction should be given to its language, if possible, as will give effect to all its provisions. *County of Moultrie v. Fairfield*, 105 U. S. 370, 26 L. Ed. 945.

Repeal by implication.

154. (Minn. 1882.) "The statute of March 5, 1870, is an affirmative act, and contains no express repeal of the act of March 6, 1868. The question is therefore whether the former act repeals the latter by implication. The leaning of the courts is against repeals by implication, and if it be possible to reconcile two statutes, one will not be held to repeal the other."

After reviewing a number of cases, held:

"The result of the authorities cited is that when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest."

Burden in such cases.

"The burden is on the town to make it appear that the act of March, 1868, which authorized the issue of the bonds, the coupons of which are in suit, was repealed by the subsequent act of 1870. In view of the considerations which we have stated, we are of opinion that the repeal has not been satisfactorily shown." *Red Rock v. Henry*, 106 U. S. 596, 1 Sup. Ct. Rep. 434, 27 L. Ed. 251.

Construction of statutes.

155. (N. J. 1882.) "It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. Rep. 391, 27 L. Ed. 431.

Repeal by implication.

156. (Ga. 1883.) "Whether the latter repeals the former law depends on whether the two are inconsistent; and, in the present instance, that depends on whether it is manifest, from the words of the enactments, that both

cover the same ground, and that the latter was intended to be a substitute for the former." *City of Savannah v. Kelley*, 108 U. S. 184, 2 Sup. Ct. Rep. 468, 27 L. Ed. 696.

157. (Ill. 1884.) Authority to a city "to borrow money on the credit of the city and issue their bonds under the seal of the city therefor" does not authorize such city, to issue bonds in aid of the construction of a railroad. *Jonesboro City v. Cairo & St. Louis R. Co.*, 110 U. S. 192, 4 Sup. Ct. Rep. 67, 28 L. Ed. 116.

Railroad-aid act in negative and inhibitory terms, held not to confer authority.

158 (Tenn. 1888.) A statute of Tennessee provided substantially, in the language of the Constitution of the State, that "the credit of no county, city, or town shall be given or loaned to, or in aid of, any person, company, association, or corporation, except" upon the assent of three-fourths of the votes cast at an election held by the qualified voters of such county city, or town, and further provided, in the exact language of the Constitution, "nor shall any county, city, or town become a stockholder with others in any company, association, or corporation, except upon a like election, and the assent of a like majority."

"The enactments in that clause are entirely inhibitory and negative in their character. They do not confer any authority for the giving or loaning of credit upon any municipality, nor confer the right upon any municipality to become a stockholder with others in any corporation; but they only prescribe the condition, that no credit shall be given or loaned, and no ownership of stock be created, unless the prescribed election be first held and the assent of three-fourths of the votes cast at it be first given. But the authority to give or loan credit, and to become a stockholder under the conditions prescribed in the act of 1871, must be found in an independent grant of authority, in some other statutory provision, either general or special. These were the views taken by the Supreme Court of Tennessee." *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. Rep. 1101, 32 L. Ed. 77.

Statutes authorizing aid to railroads to be strictly construed.

159. (Mo. 1890.) "All grants of power in such cases to subscribe for stock in railways are to be construed strictly and not to be extended beyond the terms of the law. Whilst a municipal corporation, authorized to subscribe for stock of a railroad company or to incur any other obligation, may give written evidence of such subscription or obligation, it is not thereby empowered to issue negotiable paper for the amount of indebtedness incurred by the subscription or obligation." *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. Rep. 502, 33 L. Ed. 887.

Entire act construed.

160. (Kan. 1892.) The entire law must be considered, and the intent of the legislature drawn, not from a single clause, but from the entire body of the act. *Township of Washington v. Coler et al.*, 2 C. C. A. 272, 51 Fed. 362.

Bonds issued before time authorized by law held void; authority not to be deduced from uncertain inferences; must be clear.

161. (Kan. 1893.) A statute of Kansas, relating to the organization of new counties, contained the provision that "from and after the qualification of the county officers appointed under this act the said county shall be deemed to be duly organized; provided, that no bonds except for the erection and furnishing of school-houses shall be voted for and issued by any county or township within one year after the organization of such new county, under the provisions of this act." Held, that refunding bonds issued by a new county within one year after such organization, in reliance upon the General Refunding Law of Kansas of 1879, were unauthorized and void. "It is a rule of law that the authority of a municipal corporation to issue negotiable paper must be clearly made out and established whenever the existence of such power is called in question." "A power of that nature will not be deduced from uncertain inferences, and can only be conferred by language which leaves no reasonable doubt of an intention to confer it." *Brenham v. Bank*, 144 U. S. 173, 182 (12 Sup. Ct. Rep. 559, 36 L. Ed.

390); *Ashuelot Nat. Bank v. School Dist. No. 7* (8th Circuit), U. S. App., 5 C. C. A. 468, 56 Fed. Rep. 197." *Coffin v. Board of Comrs. of Kearney County*, 6 C. C. A. 288, 57 Fed. 137.

Authority to "issue new bonds" means negotiable bonds.

162. (Kan. 1893.) "The act under consideration in this case authorized this township to 'issue new bonds' without any restriction as to their negotiability. This grant of power to a municipal body to issue bonds must be interpreted to give that body power to issue municipal bonds in the usual form of such securities. The usual — nay, it may also be said the universal — form of such securities is that of a negotiable bond payable to bearer." *West Plains Township, Meade County, v. Sage et al.*, 16 C. C. A. 553, 69 Fed. 943.

Construction of several separate statutes.

163. (Mich. 1895.) "It must be borne in mind that Howell's Annotated Statutes of Michigan, as well as the Compiled Laws of 1871, were mere official compilations or arrangements of laws, which took their force from their original enactment. *Stewart v. Riopelle*, 48 Mich. 177, 12 N. W. 36. They are not revisions, in which all the parts are to be construed together as if passed together. The laws contained in them are to be treated exactly as if still in the books of Session Laws, and the later in date must prevail over that which is earlier, because it is the latest, and therefore the controlling, command of the legislature. We must not be confused, then, by the fact that chapter 82 and chapter 81 are printed in the compilation as though both are in force; for, if they contain inconsistent provisions concerning the same subject-matter, the earlier must be deemed *pro tanto* repealed. *People v. Hobson*, 48 Mich. 27, 11 N. W. 771. The confusing character of this legislation concerning villages finds some explanation in its history."

Repeal by implication.

"It is well settled in Michigan, as elsewhere, that where a subsequent statute covers the whole ground occupied by an earlier statute, it repeals by implication the former statute,

even where there is no repugnance." *City of Gladstone v. Throop*, 71 Fed. 341, 18 C. C. A. 61.

Authority to aid "roads" includes "railroads."

164. (Ind. 1896.) Power given a city by its charter, "To take stock in any chartered company for making roads to said city," authorized the city to subscribe to the capital stock of railroads. *Evansville v. Dennett*, 161 U. S. 434, 10 Sup. Ct. Rep. 613, 40 L. Ed. 760. See also *Evansville v. Dennett*, 20 C. C. A. 142, 73 Fed. 966.

Charter limitation on indebtedness.

165. (Wash. 1897.) An indebtedness incurred by the city of Spokane Falls, under its contract for the improvement of streets, was held not to come within the debt limitation imposed by the city's charter, which authorized it "to borrow money on the credit of the city for any purpose within the authority of the corporation," and provided that "the entire indebtedness of said city must not at any one time exceed the sum of \$25,000, excluding its indebtedness for water works and assessments for improving streets under the provisions of section 7 of this chapter;" notwithstanding, the city is liable to the contractor in damages for its failure to collect assessments for his payment. *Denny v. City of Spokane*, 25 C. C. A. 164, 79 Fed. 719.

166. (Ill. 1897.) No power to issue refunding bonds exists as of course or merely because a municipal corporation is indebted. *Village of Oquawka v. Graves*, 27 C. C. A. 327, 82 Fed. 568.

Time and terms of payment of bonds.

167. (Kan. 1897.) "The power conferred upon the board of county commissioners to compromise and refund the indebtedness of the county carried with it, as incident thereto, the power to fix the time and terms of payment." *Board of Comrs. of Kiowa County, Kan., v. Howard*, 27 C. C. A. 531, 83 Fed. 286.

Construction of refunding act; held to confer authority.

168. (Kan. 1897.) The statute of Kansas, entitled "An act to enable counties, municipal corporations, the board of education of any city, and school districts to refund their in-

debtedness," approved March 8, 1879, "in express terms authorizes the county 'to compromise and refund its matured and maturing indebtedness of every kind and description whatsoever,' and confers the power upon the board of county commissioners to do this without submitting the question to a vote of the people of the county. We think the language of the act is broad enough to include not only bonds, but county warrants as well, and confers upon the board of county commissioners, as the representatives of the county, express authority to compromise and refund any outstanding indebtedness which the county may have." Board of Comrs. of Kiowa County, Kan., v. Howard, 27 C. C. A. 531, 83 Fed. 296.

Special charters; provisions of, at variance with general laws, how construed.

169. (S. Dak. 1898.) "The charter of the city of Huron is a special act, and the act of 1887 is a general law, and powers and privileges granted by a special act or charter are not affected by general legislation on the same subject, but the special charter and the general laws must stand together, the one as the law of the particular case, and the other as the general law of the land." City of Huron v. Second Ward Sav. Bank, 30 C. C. A. 38, 86 Fed. 272.

Bonds refunding county warrants; defense, absence of authority; bonds held valid; constitutional and statutory provisions considered and construed.

170. (Kan. 1898.) "It is contended that the bonds issued under chapter 50 of the Laws of 1879 are void because the act did not authorize the refunding of county warrants. County warrants are prima facie proof of the validity of the debts they evidence," citing several cases.

The provision of the Constitution of Kansas, "The legislature may confer upon tribunals transacting the county business of the several counties, such power of local legislation and administration as it shall deem expedient." is clear and full, and the Constitution imposing no limitation upon the authority of the legislature of that State to refund the debts of

the county of Seward, or upon its power to authorize the board of county commissioners of that county to do so, the acts of that board in refunding the debts of that county without a vote of its electors were neither unconstitutional nor invalid.

The statute of Kansas, which provides, "That every county * * * is hereby authorized and empowered to compromise and refund its matured and maturing indebtedness of every kind and description whatsoever, upon such terms as can be agreed upon, and to issue new bonds with semi-annual interest coupons attached in payment of any sums so compromised," authorizes the refunding of their matured or maturing debts of every kind and description, "whether they were evidenced by bonds, judgments, warrants, or simple contracts."

Special act authorizing refunding of indebtedness; construed as excepting county from operation of general law; rules of construction of special and general laws on same subject; statutes in pari materia.

A special law providing that "The board of county commissioners of Seward county, Kansas, is hereby authorized and empowered to refund any and all outstanding indebtedness existing on May 1, 1891, and still unpaid, by issuing bonds to the holders of such outstanding indebtedness," was intended by the legislature to except Seward county from the terms of a limitation contained in the General Refunding Law of Kansas.

If the two acts "are repugnant in any of their provisions, the later act operates as a repeal of the former act, so far, and only so far, as its provisions are repugnant to those of the earlier act."

"Privileges granted by special act are not affected by inconsistent general legislation on the same subject, but the special act and the general laws must stand together, the one as the law of the particular case, and the other as the general law of the land."

"All statutes in pari materia are to be read and construed together, as if they formed part of the same statute, and were enacted at the same time." Board of Comrs. of Seward County, Kan., v. Aetna Life Ins. Co., 32 C. C. A. 585, 90 Fed. 222.

Act authorizing refunding of "matured and maturing" indebtedness; authorized refunding of debt due in twenty years.

171. (Kan. 1898.) An act authorizing the issuance of county bonds to refund "matured and maturing" indebtedness construed (following the decision of the Supreme Court of Kansas) to authorize the refunding of an indebtedness not due until 1909.

"That chapter authorized the board of county commissioners to refund with negotiable bonds all indebtedness of the county that was due at the time of its passage, or that might at any time become due." Board of Comrs. of Haskell County, Kan., v. National Life Ins. Co. of Montpelier, Vt., 32 C. C. A. 591, 90 Fed. 228.

Repeals by implication are never favored.

172. (Kan. 1898.) "In support of the theory of a repeal by implication, counsel for the county invoke the rules (1) that where two acts upon the same subject are repugnant in any of their provisions the latter act repeals the former to the extent of the repugnancy; and (2) that, where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. But the laws we are considering do not fall under these rules."

"When there are two acts upon the same subject, the rule is to give effect to both, if possible. The question is whether any part of the earlier act is repealed by necessary implication. Mr. Justice Story, in delivering the opinion of the Supreme Court in *Wood v. U. S.*, 16 Pet. 217, 231, speaking of this method of repeal, said: 'We say by necessary implication; for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative, or cumulative or auxiliary.' Mr. Justice Strong, in *In re Henderson's Tobacco*, 11 Wall. 652, 657, speaking of repeal by repugnancy, said: 'But it must be observed that the doctrine asserts no more than that the former statute is impliedly repealed, so far as the provisions of the subsequent stat-

utes are repugnant to it, or so far as the latter statute, making new provisions, is plainly intended as a substitute for it.'" Board of Comrs. of Pratt County, Kan., v. Society for Savings, 90 Fed. 233, 32 C. C. A. 596.

Authority to incur debts and issue negotiable bonds must be express or clearly implied.

173. (S. Dak. 1899.) "Municipal corporations possess no power to incur debts, and issue negotiable instruments therefor, unless specially authorized to do so by their charter or statutes, or the power to do so can be clearly implied from some power expressly given, which cannot be fairly exercised without it." *Watson v. City of Huron*, 38 C. C. A. 264, 97 Fed. 449.

Rule of construction of statute.

174. (Kan. 1900.) If the meaning of a word in a statute is ambiguous, "The practical construction given to it and to the proviso in which it occurs by the officers of the State and county, and the purchasers of the bonds while they were acting and contracting under it is entitled to great consideration, and ought not to be modified or avoided to the destruction of rights resting upon it, unless that construction was clearly and palpably erroneous."

Construction of statute.

A statute of Kansas provided that no bonds should be issued by any county, township, or school district within one year after its organization. Held, that this did not prohibit the presentation of a petition or the holding of an election on a proposition to issue bonds within the year, but applied only to the actual putting out of the bonds. *Corning v. Board of Comrs. of Meade County, Kan.*, 42 C. C. A. 154, 102 Fed. 57.

Laws in pari materia.

175. (S. Car. 1901.) "All statutes in pari materia are to be read and construed together as if they formed part of the same statute and were enacted at the same time." *City of Pierre v. Dunscomb et al.*, 106 Fed. 611.

Mandatory or directory, when statutes are.

176. (La. 1901.) "Act No. 67 of 1884 is not, in any sense, a directory

or permissive statute, but it is in the highest degree mandatory. The language of the act is, 'That the board of liquidation of the city debt be, and is hereby authorized and required, and it is made the duty of said board, to retire and cancel the entire debt of the city of New Orleans,' etc. But, even if the language of the statute granting authority to the board had been permissive in form, it would be treated, on principle, as mandatory in fact." Board of Liquidation v. United States, 108 Fed. 689, 47 C. C. A. 587.

All acts in pari materia construed together.

177. (Ohio, 1901.) All statutes in pari materia are to be taken together as if they were one law, and this rule is equally applicable notwithstanding the provisions are found in different chapters or divisions of the laws, and though they are enacted at different periods of time.

Ohio statutes construed to require sale of refunding bonds by trustees of the sinking fund and not an exchange. Roberts & Co. v. Taft, 109 Fed. 825, 48 C. C. A. 681.

When power under statute in doubt, construction may be influenced by acts of municipality.

178. (Nebr. 1901.) Held, that after issuing bonds to aid in the construction of a railroad which was duly constructed, and the levying of taxes to pay the same for twenty-eight years, by a county in reliance upon the assumed authority of a statute, in case of doubts arising as to whether the statute was intended to confer such authority, the citizens and taxpayers of the county are not entitled to the same strict construction of the power of the county under the statute, which they might have insisted upon had they objected to the issuance of the obligations at any time before they were issued or shortly thereafter. Washington County v. Williams, 111 Fed. 801, — C. C. A. —.

Refunding bonds not new debt.

178a. (N. C. 1904.) "These were bonds to refund a debt. An issue of bonds to refund a debt is not the creation of a new debt. It is simply a change of form, renewing and extending a debt already existing. City of Pierre v. Dunscomb, 106 Fed. 617, 45

C. C. A. 499; Rollins & Long v. County Commissioners, 49 U. S. App. 411, 80 Fed. 692, 26 C. C. A. 91; Hughes Co. v. Livingston, 104 Fed. 306, 43 C. C. A. 553." Board of Comrs. of Henderson Co. v. Travelers Ins. Co., 63 C. C. A. 467, 128 Fed. 817.

Construction of statute by courts influenced by construction placed on it by municipalities and officers.

178b. (Neb. 1902.) A statute of Nebraska authorized precincts, townships and villages to issue bonds "in aid of works of internal improvements, highways, bridges, railroads, court-houses, jails in any part of the county and the drainage of swamps and wet lands." It was urged that the act did not authorize precincts to issue bonds to aid in the construction of irrigation canals.

"The argument would have force were it not for the fact that the contemporaneous construction of the act of March 6, 1885, in the State of Nebraska, has been different, and that bonds have been issued, under that act, by municipal precincts, in aid of the construction of canals for the purpose of irrigation, upon the assumption that the act authorizes precincts to aid in the construction of any work of internal improvement." Kieth County v. Citizens Savings & Loan Assn., 53 C. C. A. 525, 116 Fed. 13.

Repeal of statute applying to a particular matter, by a subsequent general statute; rule stated.

178c. (Ky. 1904.) "The general rule is that an act which relates to a particular subject is not repealed by a later one which is general in its terms, but would include the particular case if that were not already provided for. The exception to this rule is that, if it plainly appears that the later general statute was intended to cover the particular case, and hold sway in place of the former act, the latter must be regarded as repealed by implication. But, as repeals by implication are not favored, the intent to repeal must 'plainly appear.' And it is manifest that it can not be said that the intention to repeal is clearly shown when the general statute by its own terms admits of exceptional cases where other provision is made." Guthrie v. Sparks, 65 C. C. A. 427, 131 Fed. 443.

2. Authority to Issue Municipal Bonds, when Implied; Incidental Powers.

Power implied.

179. (Pa. 1860.) A statute authorized counties to subscribe to the capital stock of a railroad company, and to make payment of same on such terms, and in such manner, as may be agreed upon by said company and the proper county, and provided that, "Whenever the bonds of the respective counties are given in payment of subscriptions, that the same shall not be sold by the railroad company at less than par value, and no bonds shall be in less amount than one hundred dollars, and that such bonds shall not be subject to taxation until the clear profits of said railroad company shall amount to 6 per cent. upon the cost thereof." Held, that power was given by said act by implication to issue the bonds of the county in payment of such subscription. *Jacob E. Curtis, Plaintiff, v. The County of Butler*, 24 How. 435, 16 L. Ed. 745; *Woods v. Lawrence County*, 1 Black, 386.

Power to issue bonds implied.

180. (Iowa, 1863.) The act of incorporation of the city of Dubuque, Iowa, authorized the city "To borrow money for any public purpose," and provided that "The loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative." Referring to this act and other statutes relating to subscriptions to the capital stock of railroad companies,

Held, "In this act it is clearly implied that cities have authority to subscribe for railroad stock, and to issue their bonds in payment of it. What is implied in a statute is as much a part of it as what is expressed. (*United States v. Babbitt*, 1 Black, 61.) Considering the subject in the light of these acts, we entertain no doubt that the city possessed the power to issue these bonds." *Gelpeke, et al., v. The City of Dubuque*, 1 Wall. 175, 17 L. Ed. 520. See, also, *Gelpeke v. Dubuque*, 1 Wall. 220, 17 L. Ed. 530.

Authority implied to issue bonds.

181. (Pa. 1863.) A statute of Pennsylvania authorized any incorporated city to subscribe to the stock of a railroad company, "as fully as any

individual." Held, that authority was thereby given to issue bonds in payment of such subscription. *Seybert v. City of Pittsburgh*, 1 Wall. 272, 17 L. Ed. 533; *Rogers v. Burlington*, 3 Wall. 354, 18 L. Ed. 79.

Authority to make expenditures for certain purposes, may imply authority to incur indebtedness.

182. (La. 1872.) "That a municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness, and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable considerations that may exist or arise between the parties and to any modification, abatement, or rescission, in whole or in part, that may be just and proper in consequence of illegalities, or disregard or betrayal of the public interests."

Power granted to levy taxes and make improvements does not imply authority to issue bonds.

"We have therefore the question directly presented in this case whether the trustees or representative officers of a parish, county, or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of bona fide holders, for the purpose of raising money or funding a previous indebtedness." Held, that no such power could be implied. *Police Jury v. Britton*, 15 Wall. 566, 21 L. Ed. 251.

Implication from form of submission of proposition.

183. (Iowa, 1872.) The Code of Iowa authorized the county judge sitting as a County Court, "To provide for the erection and reparation of court-houses, jails, and other necessary

buildings within and for the use of the county." A statute also provided that the judge may submit to the people, at a regular or special election, "The question whether money may be borrowed to aid in the erection of public buildings;" and that, "when the question so submitted involves the borrowing or expenditure of money, it must be accompanied by a provision to lay a tax for the payment thereof," and that "no vote adopting the question proposed will be of effect unless it adopt the tax also." The question submitted to the voters was: "Whether the county judge, at the same time of levying the taxes for the year 1860, should levy a special tax of seven mills on a dollar of valuation, for the purpose of constructing a courthouse in said county, and said tax to be levied from year to year until a sufficient amount is raised for said purpose, not, however, to exceed ten years." There was the requisite majority in favor of the proposition. Held, that it was implied by this submission that money was to be borrowed to accomplish the object. *Lynde v. The County*, 16 Wall. 6, 21 L. Ed. 272.

Authority to issue bonds not implied from authority to make contracts for building sidewalks, etc.

184. (Tex. 1877.) Charter authority to the council of the city of Galveston, Texas, "to establish, erect, construct, regulate, and keep in repair, bridges, culverts and sewers, sidewalks and crossways, and to regulate the construction and use of the same," and providing for special assessments to be made upon abutting property to pay the cost of construction of sidewalks, does not carry with it authority to issue bonds in payment of a contract for such improvements. *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659.

Authority to subscribe railroad stock on behalf of county does not imply authority to issue bonds to pay therefor.

185. (Miss. 1880.) Authority given to the supervisors of a county to subscribe to stock of a railroad company on behalf of the county, after a majority of the electors of the county had, in a proper way, given their con-

sent, and to levy a tax to pay the same, does not authorize the issuing of bonds and thereby incurring an obligation by the county for the payment of such subscription. *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122.

Authority to subscribe railroad stock does not imply authority to issue bonds in payment of such subscription.

186. (Mo. 1880.) Under legislative authority, county commissioners submitted to the taxable inhabitants of a strip five miles on each side of a railroad passing through the county, the question of subscribing to the stock of said railroad and the imposing upon them of a tax wherewith to pay such subscription. Held, that the authority conferred by the legislature to vote such subscription and tax did not carry with it or imply authority to issue bonds for the payment of such subscription. *Ogden v. County of Daviess*, 102 U. S. 634, 26 L. Ed. 263.

No implied authority to issue negotiable bonds from authority to erect courthouse.

187. (Tenn. 1884.) "The doctrine of the charge (of the court below) is that the power of a county to erect a courthouse involves and implies the power to contract for its erection, and the power to contract involves and implies the power to execute notes, bonds, and other commercial paper as evidence or security for the contract; or, to state it according to its legitimate conclusion and result, it is this, that whenever a county has power to contract for the performance of any work or for any other thing, it has incidental power to issue commercial paper in payment thereof; that the one power implies the other. It being clear that the county of Claiborne had power to erect a courthouse, the court below held that this involved an implied power to contract out the work, and to issue negotiable bonds of a commercial character in payment thereof. We cannot concur in this view."

"Our opinion is, that mere political bodies, constituted as counties are, for the purpose of local police and administration, and having the power of levying taxes to defray all public

charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it." *Claiborne County v. Brooks*, 111 U. S. 400, 4 Sup. Ct. Rep. 489, 28 L. Ed. 470.

Authority to borrow money and issue bonds therefor implies negotiable bonds.

188. (Ky. 1887.) "It is no doubt true that, without sufficient legislative authority, a municipality cannot issue commercial paper, which will be free from equitable defenses in the hands of innocent holders (*Claiborne County v. Brooks*, 111 U. S. 400); but, in our opinion, that authority was given here. The county of Carter was authorized to borrow money and to issue its bonds therefor to pay its subscription to the stock of the railroad company. This, all agree, was sufficient authority to issue bonds which were negotiable, and the averments in the declaration are that the bonds which were in fact issued had that character." *Carter County v. Sinton*, 120 U. S. 517, 7 Sup. Ct. Rep. 650, 30 L. Ed. 701.

Authority to appropriate money in aid of railroads does not imply authority to issue bonds.

189. (Ill. 1887.) The town of Concord, Illinois, in 1871, issued its negotiable coupon bonds, purporting upon their face to have been "issued under and by virtue of a law of the State of Illinois to authorize cities, towns, or townships within certain limits to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville & Vincennes Railroad," and the faith of the town is pledged for the payment of the principal and interest. The act recited was passed March 7, 1867, and authorized incorporated towns and cities and townships acting under the Township Organization Law within certain territorial limits (which includes the town of Concord) to appropriate such sum of money as they deem proper to the Chicago, Danville & Vincennes

Railroad Company to aid in the construction of its road, "to be paid to said company as soon as the track of said road shall have been located and constructed through said city, town, or township, respectively," provided the appropriation is first sustained at the polls by a majority of the electors of the municipality. The act required the authorities of said townships, towns, and cities, respectively, to levy and collect a tax and make such provisions as may be necessary and proper for the prompt payment of the appropriation. Held, that this statute "neither expressly nor by implication invested the municipal corporations, embraced by its provisions, with the power to issue commercial paper in payment of an appropriation so voted." *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. Rep. 937, 30 L. Ed. 885.

Authority to subscribe for stock of railroad company does not imply authority to issue bonds.

190. (Miss. 1887.) The bonds involved in this suit contained the following recital:

"This bond is issued under and pursuant to the Constitution and laws of the State of Mississippi, the charter of the city of Aberdeen, and ordinances passed by the mayor and selectmen of the city of Aberdeen, on the 20th of April, A. D. 1870." There was no averment in the declaration that the levy of a tax to pay the subscription for which the bonds had been issued had ever been approved by the legal voters of the city, as its charter required. Defendant demurred to the declaration on the ground of want of authority to make a subscription or issue the bonds. Demurrer sustained.

"In our opinion, upon the facts stated in the declaration, the city had no authority to issue the bonds. The amendment of the charter, taken as a whole, shows clearly that the legislature did not intend to allow the city authorities to make a subscription which would bind the taxpayers for its payment by the levy of a tax, until the legal voters had approved of such a tax by a majority vote at an election held as other elections were held. As was said in *Wells v. Supervisors*, 102 U. S. 630, the policy of Missis-

issippi, 'from its earliest history seems to have been to require municipal organizations to meet their current liabilities by current taxation;' and in *Hawkins v. Carroll County*, 50 Miss. 735, 762, it was expressly declared that 'the grant of power to such a body of an extraordinary character, such as is not embraced in the general scope of its duties, must be strictly construed.' In the present case the mayor and selectmen had power to contract with the railroad company and to subscribe to its stock on 'such terms and conditions as they may stipulate and agree upon;' but there was no express authority to borrow money to meet the payment nor to issue bonds. The authority to agree on 'terms and conditions' does not necessarily imply such a power. It more naturally refers to stipulations about the location of the road and the expenditure of the money subscribed of the general character of those which were actually made part of this subscription, namely, that the road should pass through Aberdeen, and that the amount of the subscription should be expended in building it in Monroe county. It could give no power to bind the city to levy a tax to pay the subscription before the tax was voted, because section 2 expressly declares that there shall be no tax without a vote. If voted, the city authorities might probably bind the city for its levy and collection. But if not voted, there was no power to bind the taxpayers in any form for its levy, and that would be the legal effect of a valid negotiable coupon bond given in payment of the subscription if found in the hands of a bona fide holder for value before maturity. If payment could be made without a tax, the mayor and selectmen might subscribe to any extent they deemed expedient. But if the subscription was in any event to be paid by a tax, the tax must be voted before any obligation for its payment could be incurred." *Katzenberger v. Aberdeen*, 121 U. S. 172, 7 Sup. Ct. Rep. 947, 30 L. Ed. 911.

Authority to subscribe railroad stock does not imply authority to issue bonds in payment.

191. (Tenn. 1888.) Bonds issued by the town of Milan, Tennessee, in 1873,

in payment of a subscription made by the town to the stock of the Mississippi Central Railroad Company, recited as the consideration for their issuance the "location of the Mississippi Central railroad by said town."

"The grant of authority to a municipal corporation to subscribe for the stock of a railroad company does not carry with it the power to issue negotiable bonds to pay for the subscription, or anything more than the power to raise money by taxation to pay the amount of the subscription. If, in the statute granting the power to subscribe for the stock, no manner of paying the subscription is provided for, it can not be paid by issuing negotiable bonds. The practice in Tennessee, as shown by its statute books, has been to authorize expressly the issuing of negotiable bonds by municipal corporations to pay for subscriptions to stock, in all cases where it was desired to confer upon such corporations the power to issue such bonds."

The statutes of Tennessee relating to aid to railroads by municipal corporations reviewed, and held, that they do not authorize the issuance of municipal bonds for such purpose. *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. Rep. 1101, 32 L. Ed. 77. To same effect, *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. Rep. 1111, 32 L. Ed. 85.

No authority to aid railroads except by legislative permission; no implied authority therefrom to execute negotiable bonds.

192. (Mich. 1889.) "By an unbroken current of decisions by this court and by all other courts, too numerous to mention, it is settled law that a municipality has no power to make a contract of this character (aid to railroads), except by legislative permission. It is manifest that, such being the case, the legislature, in granting such permission, can impose such conditions as it may choose; and even where there is authority to aid a railroad and incur a debt in extending such aid, it is also settled that such power does not carry with it any authority to execute negotiable bonds except subject to the restrictions and directions of the enabling act. *Wells v. Supervisors*, 102 U. S. 625 (26 L. Ed.

122); *Claiborne County v. Brooks*, 111 U. S. 400 (4 Sup. Ct. Rep. 489, 28 L. Ed. 470), *Kelley v. Milan*, 127 U. S. 139 (8 Sup. Ct. Rep. 1101, 32 L. Ed. 77)." *Young v. Clarendon Township* 132 U. S. 340, 10 Sup. Ct. Rep. 107, 33 L. Ed. 356.

Authority to subscribe railroad stock; no implied authority to issue negotiable bonds; strict construction of enabling acts; when authority implied; legislation restricted by constitution.

193. (Mo. 1890.) A statute of Missouri empowered the County Court of any county in which any part of the route of a railroad may lie, to subscribe to the capital stock of the company, and to issue bonds therefor, and further empowered any incorporated city or town to subscribe for stock of such railroad company, under prescribed conditions. Held, that, although the statute authorized counties to issue bonds for such purpose, no such power could be implied from such act to incorporated cities and towns to issue bonds for the purpose.

"It leaves the town to provide for the payment of the stock in the ordinary way in which debts contracted by a town are met, that is, by funds arising from taxation. It is well settled that the power to subscribe for stock does not of itself include the power to issue bonds of a town in payment of it. All grants of power in such cases to subscribe for stock in railways are to be construed strictly and not to be extended beyond the terms of the law. Whilst a municipal corporation, authorized to subscribe for the stock of a railroad company or to incur any other obligation, may give written evidence of such subscription or obligation, it is not thereby empowered to issue negotiable paper for the amount of indebtedness incurred by the subscription or obligation."

"The inability of municipal corporations to issue negotiable paper for their indebtedness, however incurred, unless authority for that purpose is expressly given or necessarily implied for the execution of other express powers, has been affirmed in repeated decisions of this court."

The legislature can authorize mu-

nicipal corporations to issue their bonds or loan their credit only under and subject to the restrictions of the Constitution. *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. Rep. 502, 33 L. Ed. 887.

Implied authority to create a debt or contract a loan does not imply authority to issue negotiable bonds; nor authority to renew such debt by issuing refunding bonds; discussion of principles.

194. (Ind. 1891.) The statutes of Indiana contained the provision, "No incorporated town under this act shall have power to borrow money or incur any debt or liability, unless the citizen owners of five-eighths of the taxable property of such town, as evidenced by the assessment-roll of the preceding year, petition the board of trustees to contract such debt or loan. And such petition shall have attached thereto an affidavit verifying the genuineness of the signatures to the same. And for any debt created thereby, the trustees shall add to the tax duplicate of each year, successively, a levy sufficient to pay the annual interest on such debt or loan, with an addition of not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof."

This court, following the holding of the Supreme Court of Indiana, held that under this provision, a town in Indiana had implied authority to borrow money or contract a loan under the conditions and in the manner prescribed. Held, further, however, that such implied power to borrow money or contract a loan did not carry with it the further implication of power to issue negotiable bonds for such debt or contract, or to issue negotiable funding bonds to renew the debt, to be sold in the open market as commercial paper, and that the bonds involved in this suit, being such funding bonds, were unauthorized and void. *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. Rep. 441, 34 L. Ed. 1069.

A full and instructive discussion of the law relating to implied power of municipal corporations to issue negotiable paper will be found in the opinion in this case, delivered by Mr. Justice Lamar.

Authority to borrow money does not confer power to issue negotiable bonds for the debt; cases reviewed.

195. (Tex. 1892.) This was an action at law on interest coupons from bonds issued by the city of Brenham, in 1879, due twenty years after date, purporting to be for general purposes. The bonds were sold at a discount and the proceeds were expended for other than general purposes. The authority relied upon for their issuance was a provision in the charter of the city of Brenham, passed February 4, 1873, as follows: "Sec. 2. That the city council shall have power and authority to borrow for general purposes not exceeding (\$15,000) fifteen thousand dollars on the credit of said city." Held, that said charter provision did not give the city any power to issue negotiable interest-bearing bonds of the character of those involved in this suit; that in the exercise of the power conferred by the city to borrow money not exceeding \$15,000 on its credit for general purposes, the city could give to the lender as a voucher for the payment of the money evidence of indebtedness in the shape of nonnegotiable paper, but could not issue its negotiable bonds, unimpeachable in the hands of a bona fide holder.

"The confining of the power in the present case to a borrowing of money for general purposes on the credit of the city limits it to the power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the grant of the power was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and not to plunge the municipal corporation into a debt on which interest must be paid at the rate of 10 per centum per annum, semi-annually, for at least ten years. It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and, under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case." *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79; *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350;

Police Jury v. Britton, 15 Wall. 566, 21 L. Ed. 251; *Claiborne County v. Brooks*, 111 U. S. 400, 4 Sup. Ct. Rep. 489, 28 L. Ed. 470; *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. Rep. 937, 30 L. Ed. 885; *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. Rep. 1101, 32 L. Ed. 77; *Young v. Clarendon Township*, 132 U. S. 340, 10 Sup. Ct. Rep. 107, 33 L. Ed. 356; *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. Rep. 502, 33 L. Ed. 887; *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. Rep. 441, 34 L. Ed. 1069, considered, and *Rogers v. Burlington and Mitchell v. Burlington* (supra), held to have been overruled. *Brenham v. German-American Bank*, 144 U. S. 173, 12 Sup. Ct. Rep. 559, 36 L. Ed. 390.

Authority to attach interest coupons.

196. (Kan. 1893.) It was contended that even if the bonds were valid the coupons were not, because coupons are not named in the section of the statute authorizing the issuing of the bonds.

"But coupons are simply instruments containing the promise to pay interest, and the express authority was to issue bonds bearing interest. While it is true that the power to borrow money, granted to a municipal corporation, does not carry with it by implication the power to issue negotiable bonds (*Brenham v. German-American Bank*, 144 U. S. 173, 12 Sup. Ct. Rep. 559, 36 L. Ed. 390), we are of opinion that the express power to issue bonds bearing interest carries with it the power to attach to those bonds interest coupons." *Atchison Board of Education v. De Kay*, 148 U. S. 591, 13 Sup. Ct. Rep. 706, 37 L. Ed. 573.

197. (Nebr. 1893.) Authority to issue negotiable bonds is not to be implied from authority to borrow money for the purpose of erecting and furnishing schoolhouses. *Ashuelot Nat. Bank of Keene v. School District No. 7, Valley County*, 5 C. C. A. 468, 58 Fed. 197.

Statutory authority to issue bonds implies negotiable bonds.

198. (Mich. 1893.) Statutory authority to issue bonds for loans lawfully made by a municipal corporation and to issue new bonds in place of former bonds falling due contem-

plates, and by necessary implication authorizes, the issue of negotiable bonds.

"The general power to issue 'bonds' must be taken to authorize 'bonds' in the usual form of such well-known commercial obligations. That usual form embodies a contract and obligation negotiable in its form." *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. Rep. 559, distinguished. *City of Cadillac v. Woonsocket Inst. for Savings*, 7 C. C. A. 574, 58 Fed. 935; *Ashley v. Board of Supervisors*, 60 Fed. 55, 8 C. C. A. 455.

Authority to issue bonds implied from authority to borrow money.

199. (Ind. 1894.) The act of 1847 incorporating the city of Evansville, Indiana, "confers upon the common council the control and management of the finances and property of the city, and power to make ordinances, rules, and regulations for certain purposes, and on subjects enumerated in a number of clauses, among which are (clause 40), to take stock in any chartered company for making roads to said city, etc., and, where stock is taken, 'to borrow money and levy and collect a tax for payment of such stock;' (clause 41) 'to borrow money for the use of the city of Evansville.'" Held, by this court, adopting the construction of this act by the Supreme Court of Indiana, that the provisions of said act of incorporation conferred authority upon the city of Evansville to issue the bonds involved in this suit. *City of Evansville v. Woodbury, et al.*, 9 C. C. A. 244, 60 Fed. 718.

Express power to borrow money implies power to issue bonds.

200. (Ind. 1896.) "The charter of the city of Evansville gave authority to subscribe to stock of these railroad corporations, and, as held by the Supreme Court of Indiana, in *Evansville, Indianapolis & Cleveland Straight Line Railroad Co. v. Evansville*, 15 Ind. 305, 412, the express power given to borrow money necessarily implied 'the power to determine the time of payment, and also the power to issue bonds or other evidences of indebtedness.'" *Evansville v. Dennett*, 161 U. S. 135, distinguished. See, also, *Evansville v. Dennett*, 20 C. C. A. 142, 73 Fed. 966.

Authority to borrow money; no authority to issue negotiable securities; bona fide holder not protected.

201. (Cal. 1897.) Bonds were issued by the city of San Diego, negotiable in form, bearing date January 1, 1873, and October 4, 1875. The authority claimed for their issue was section 10 of an act of the legislature of the State, approved March 7, 1872, which conferred upon the board of trustees of the city of San Diego the power "to borrow money upon the faith and credit of the city; but no loan shall be made without the consent to such loan of a majority of the real estate owners of the city residing therein, previously obtained." The bonds were issued for the purpose of assisting in carrying out a contract which was made between a "citizens' committee of forty" of the city of San Diego and Col. Thomas A. Scott, relative to the construction of the Texas & Pacific railway to the city. Held, that the act conferred no authority to issue negotiable securities and that the bonds were void even in the hands of bona fide holders. *Lehman v. City of San Diego*, 27 C. C. A. 668, 83 Fed. 669.

Authority to issue funding bonds implied.

202. (S. Dak. 1901.) The laws of South Dakota provided: "That the city council of every such city should have the power 'to borrow money on the credit of the corporation for corporate purposes and issue bonds therefor in such amounts and forms and on such conditions as it shall prescribe,' upon a favorable vote of a majority of the legal voters of its city." Held, that by this provision the city was authorized to issue its bonds to fund its floating indebtedness.

"The power to issue bonds, granted to the city council of the city of Pierre by this act of 1890, was plenary. It was general, not special. It was not limited to any specific purpose, but was to borrow money and issue bonds for all corporate purposes. The whole is greater than any of its parts and includes them all, and the power to borrow money and issue bonds for all corporate purposes necessarily includes the power to do so for the purpose of paying or funding the floating indebtedness of the corporation." *City*

of *Pierre v. Dunscombe, et al.*, 106 Fed. 611.

Power to contract indebtedness; street improvement bonds under charter of superior not general obligations of city.

203. (Wis. 1906.) Action against the city of Superior to recover a judgment on its "Street Improvement Bonds."

"Recovery is sought against the city, as a general obligation assumed by it, in thus issuing and selling the bonds, and not dependent upon the collection of the special assessments referred to. The primary test of liability, therefore, irrespective of the recitals, is, whether the charter provisions vest power in the city to incur such general obligation in any event. That power to borrow money 'does not belong to a municipal corporation as an incident of its creation,' and 'must be conferred by legislation, either express or implied,' is stated by Mr. Justice Bradley, in the prevailing opinion in *The Mayor v. Ray*, 19 Wall. 468, 475, 22 L. Ed. 164, as the general doctrine. See 1 *Dillon's Municipal Corp.* (4th Ed.) pp. 122, 125. The only dissent from this expression of the rule—and as well the diversity of opinion in the general authorities—arises out of the strict limitation it may impose in reference to an implied power. It is well settled, however, that the municipality can incur no indebtedness for an object not within the powers, express or implied, granted by its charter, and that the purchaser of a bond is chargeable with notice of the charter powers, when the purpose is fully disclosed in the bond recitals. If the city of Superior was not empowered to assume and pay for the improvements described in the bond, or incur indebtedness for such expenditure, as a general municipal charge, it is plain that such liability cannot be imposed in this action. The purpose and material facts are recited in the bonds and none of these recitals tend to the view of general liability—aside from the formal promises of the city and pledge of its 'faith and credit'—while the purchaser is bound by the law and facts thus brought to his attention."

Provisions of the charter of Superior, with reference to the issuance of such bonds examined and construed

and decisions of the Supreme Court of Wisconsin distinguished. *White River Sav. Bank of White River Junction, Vt., v. City of Superior*, 78 C. C. A. 169, 148 Fed. 1.

Sewer improvement bonds of the city of Superior held to be general obligations.

204. (Wis. 1906.) Action against the city of Superior on its sewer bonds. The charter of the city provided for the collection of special assessments to pay such bonds. Section 202 of the charter authorized the issue of bonds to cover all special assessments which lot owners do not elect to pay within a designated time.

It is provided that such bonds "shall specify on their face that they are sewerage bonds and chargeable only on the particular lots and parcels of land described therein and such other provisions as the council may think proper to insert."

The charter further provided as follows:

"Section 203. Said bonds may be sold by the common council at not less than par value, and the proceeds paid to the sewerage contractor, or the contract may provide that the contractor shall take the bonds as a payment on his contract at their par value with accrued interest."

"Section 204. The city shall pay the principal and interest on said bonds as they fall due, and shall reimburse itself by a tax on the particular lots mentioned in said bonds in the following manner."

"Section 205. The city clerk shall, in each year for five years succeeding the issue of said bonds, enter in the tax-roll as a special tax upon each of the parcels of land mentioned in said bonds, one-fifth of the special assessments as to each said parcel of land with six per cent. interest on the whole amount of said special assessment on such parcel of land then unpaid. Said tax shall be treated in all respects as any other city tax, and when collected shall be credited to the sewerage fund of said city."

"Express authority is thus given:

(1) to issue the bonds, with 'such other provisions as the council may think proper to insert;' (2) to sell them, 'at not less than par value' and pay the proceeds to the contractor,

except when the contract provides for the contractor to take them; and (3) the city is required to pay principal and interest 'as they fall due, and shall reimburse itself' through the special assessments. The purpose to make the bonds, when so issued and sold, general obligations of the city, to accomplish their sale at par value, is unmistakable; and under such legislative intent the authority to that end is ample. *Fowler v. City of Superior*, 85 Wis. 411, 410, 423, 54 N. W. 800; *United States v. Fort Scott*, 99 U. S. 152, 157, 160, 25 L. Ed. 348. Under the recitals in the bond, the city can not now raise objection that

funds were not provided to meet such requirement. *King v. City of Superior*, 117 Fed. 113, 118, 54 C. C. A. 499. The provisions referred to exempt the bonds in suit from the rule of *Uncas National Bank v. Superior*, 115 Wis. 340, 344, 91 N. W. 1004, referred to in the above mentioned opinion of this court in *White River Savings Bank v. City of Superior*, and from the distinctions, as well, upon which we were constrained to pronounce against liability in the last mentioned case." *City of Superior v. Marble Sav. Bank of Rutland, Vt.*, 78 C. C. A. 175, 148 Fed. 7.

C. Irregular or Wrongful Exercise of Power in Issuing Bonds Distinguished from Absence of Authority; Noncompliance with Constitutional and Statutory Conditions and Limitations; Fraud or Other Misconduct of Corporate Officers.

Irregular exercise of authority; non-compliance with statutory requisition as to notice of election; determination by county board of compliance binding on county; presumption from issue and contents of bonds.

205. (Ind. 1858.) A statute of Indiana authorized the board of commissioners of Knox county to subscribe to the capital stock of a railroad company, if authorized by the vote of a majority of the electors of the county. An election was held and stock was subscribed for and bonds were issued by the board.

In an action on interest coupons from such bonds by a bona fide holder it was urged as a defense that the board was without authority to issue the bonds, for the reason that the requirements of the statute in respect to the notices to be given of the election had not been complied with. Held, that as by the terms of the statute the board was required to determine whether the requirements of the statute had been complied with before the issuing of the bonds, its determination that they had been was binding upon the county, and that the board had authority to issue the bonds and that it thereby bound the county notwithstanding its failure to comply with the requirements of the statute.

It is insisted that an irregularity or omission in these notices had the effect to deprive the board of this authority, or rather furnish evidence that the power had never vested in it under the act; and, further, that the plaintiffs are chargeable with a knowledge of all substantial defects or irregularities in these notices of the election, and not therefore entitled to the character of bona fide holders of the securities.

"The act in pursuance of which the bonds were issued is a public statute of a State, and it is undoubtedly true that any person dealing in them is chargeable with a knowledge of it; and as this board was acting under delegated authority he must show that the authority has been properly conferred. The court must therefore look into the statute for the purpose of determining this question; and upon looking into it, we see that full power is conferred upon the board to subscribe for the stock and issue the bonds, when a majority of the voters of the county have determined in favor of the subscription, after due notice of the time and place of the election. The case assumes that the requisite notices were not given of the election, and hence that the vote has not been in conformity with the law.

"This view would seem to be de-

visive against the authority on the part of the board to issue the bonds, were it not for a question that underlies it; and that is, who is to determine whether or not the election has been properly held, and a majority of the votes of the county cast in favor of the subscription? Is it to be determined by the court, in this collateral way, in every suit upon the bond, or coupon attached, or by the board of commissioners, as a duty imposed upon it before making the subscription?

"The court is of opinion that the question belonged to this board. The act makes it the duty of the sheriff to give the notices of the election for the day mentioned, and then declares, if a majority of the votes given shall be in favor of the subscription the county board shall subscribe the stock. The right of the board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription; and to have acted without first ascertaining it would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. This board was one, from its organization and general duties, fit and competent to be the depository of the trust thus confided to it. The persons composing it were elected by the county, and it was already invested with the highest functions concerning its general police and fiscal interests.

"We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached; but, after the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a bona fide holder of the bonds in this collateral way.

"Another answer to this ground of defense is, that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained, from the fact of

the subscription, by the board, to the stock of the railroad company, and the issuing of the bonds.

"The bonds on their face import a compliance with the law under which they were issued. 'This bond,' we quote, 'is issued in part payment of a subscription of two hundred thousand dollars, by the said Knox county, to the capital stock, etc., by order of the board of commissioners,' in pursuance of the third section of the act, etc., passed by the general assembly of the State of Indiana, and approved 15th January, 1849.

"The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power." Commissioners of Knox County, *Indiana v. Aspinwall et al.*, 21 How. 539, 16 L. Ed. 208.

Irregular issue; noncompliance with conditions assented to by voters; bona fide holder protected.

206. (Ky. 1871.) A statute of the State of Kentucky required as a condition precedent to the right of a city to subscribe to the capital stock of a railroad company and to issue its bonds therefor, that the proposition should be submitted to the qualified voters of the city and be approved by a majority of those voting on the question. Such proposition was submitted to the voters of the city of Lexington, embodying certain conditions, and was carried. Bonds were issued to the railroad company, but without compliance with the conditions contained in the submission, and were negotiated by the company.

In a suit on interest coupons of the bonds by a bona fide holder, it was urged as a defense that the officers of the city were without authority to bind the corporation by the issue of bonds without complying with the conditions assented to by the voters. Held, that "when a corporation has power under any circumstances to issue negotiable securities the bona fide holder has a right to presume that they were issued under the circumstances which give the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." *City of Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809.

Legal authority for issue shown; non-compliance with forms of law or fraud in agents of corporation not available as a defense against bona fide holder.

207. (Wis. 1872.) "By the act of February 10, 1854, the legislature of Wisconsin authorized the supervisors of the town of Grand Chute to make a plankroad subscription to the amount of ten thousand dollars. The bonds in question were signed by the chairman of the board of supervisors of that town, and recited that the subscription had been made by the supervisors of the town, and that these bonds were issued in pursuance thereof for the purpose of carrying out the provisions of that act. The plaintiff was a bona fide holder for value of the bonds in suit and his title accrued before their maturity. The cases cited are an answer to the numerous offers to show want of compliance with the forms of law, or to show fraud in their own agents." The following cases reviewed and followed: *Knox County v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Meyer v. City of Muscatine*, 1 Wall. 384, 17 L. Ed. 504; *Woods v. Lawrence County*, 1 Black, 386, 17 L. Ed. 122; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520. *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170.

Statutory conditions; notice of election; majority vote; determination by officers of compliance; action by bona fide holder; estoppel.

208. (Ill. 1875.) An act of the legislature of Illinois, incorporating the C. & R. R. Railroad Company, authorized any city, town, or township, along or near the route of the road, to subscribe to the capital stock of the company and to issue its bonds to the company for the amount of the stock so subscribed, to aid in the construction of the road, when authorized by a majority of all the legal voters of the body, voting at an election called for the purpose, of which election thirty days' notice was required to be given; and when so authorized, the subscription was to be made and the bonds were to be executed and delivered to the company by the officers designated in the act. Bonds were issued by the town of Coloma to the railroad company, purporting to have

been issued by virtue of said act and in accordance with a vote of its electors.

In an action upon interest coupons of such bonds by a bona fide holder, the town urged as a defense want of authority in its officers to issue them for the reason that some of the requirements of the statute had not been complied with. Held, that there was legal authority vested in the officers of the town to issue the bonds and thereby bind the town for their payment, and that such defense was not available against a bona fide holder.

"At the outset, it is to be observed that the question is not between the town and its own agents; it is rather between the town and a person claiming through the action of its agents. The rights of the town as against its agents may be very different from its rights as against parties who have honestly dealt with its agents as such, on the faith of their apparent authority."

Speaking of the requirements of the statute, the court say: "Most of these provisions are merely directory. But conceding, as we do, that the authority to make the subscription was, by the eleventh section of the act, made dependent upon the result of the submission of the question, whether the town would subscribe to a popular vote of the township, and upon the approval of the subscription by a majority of the legal voters of the town voting at the election, a preliminary inquiry must be, How is it to be ascertained, whether the directions have been followed? Whether there has been any popular vote, or whether a majority of the legal voters present at the election did, in fact, vote in favor of a subscription? Is the ascertainment of these things to be before the subscription is made, and before the bonds are issued; or must it be after the bonds have been sold, and be renewed every time a claim is made for the payment of a bond or a coupon? The latter appears to us inconsistent with any reasonable construction of the statute."

"The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. They have declared the contingency to have happened, on the occurrence of which the authority to issue the bonds

was complete. Their recitals are such a decision; and beyond those a bona fide purchaser is not bound to look for evidence of the existence of things in pais. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by the law confided to others—to those most competent to decide it—and which the purchaser is, in general, in no condition to decide for himself." *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579. To the same effect: (*N. Y.* 1875.) *Town of Venice v. Murdock*, 92 U. S. 494, 23 L. Ed. 583.

Railroad aid; authority to donate right of way, etc.; delivery of bonds in lieu thereof; bona fide purchaser protected.

209. (*Kan.* 1875.) In pursuance of an ordinance passed by the mayor and council of the city of Fort Scott, Kansas, an election was held, at which was submitted to the qualified electors of the city the question of authorizing the mayor and city council to issue bonds in a sum not exceeding \$25,000, for the purpose of procuring the right of way for the road of the M. K. & T. Railway Company and procuring grounds for depots, engine-houses, machine shops, and yard-room, and donating the same to the company. The proposition was approved by a large majority of the voters, and the bonds were issued and registered in the office of the auditor of the State, who certified on each bond that it had been regularly and legally issued, etc., as a statute of the State required.

In an action upon interest coupons by a purchaser of the bonds, the city set up as a defense want of legal authority for their issuance for the purpose of making such donation to the railroad company. A statute of Kansas authorized such cities (of the second class) to subscribe for and take stock in any railroad company duly organized under the laws of the State or Territory, and to loan their credit to such corporations on such conditions as they might prescribe. Another act (act of February 28, 1868), providing for the incorporation of cities of the second class, empowered the mayor and council to enact, ordain, alter, modify, or repeal such ordinances as shall be deemed expedient.

"for the benefit of trade and commerce," "to take all needful steps to protect the interest of the city, present or prospective, in any railroad leading from or toward the same, but not to take stock in any railroad without a vote of a majority of the legal voters," and further authorized all such ordinances as may be expedient and not inconsistent with the laws of the State, maintaining "the trade, commerce, and manufactories" of the city; "to take private property for public use, or for the purpose of giving the right of way or other privilege to any railroad company, or for the purpose of erecting or establishing market-houses and market-places, or for any other necessary public purpose. Provided, however, that in all cases the city shall make the person or persons whose property shall be taken or injured thereby adequate compensation therefor, to be determined by the assessment of five disinterested householders of the city;" "to borrow money on the credit of the city," with no other limitation than that no money shall be borrowed on any contract thereafter made exceeding \$2,000 without the instruction of a majority of all the votes cast at an election held in the city for that purpose, and to issue bonds to fund any and all indebtedness existing or subsequently created, due or to become due. Held, that the act of 1868 authorized such aid to railroad companies by donation and that the bonds, having been delivered to the railroad company in lieu of said grounds and right of way, by direction of the mayor and council in an ordinance passed by that body, were binding on the city in the hands of a purchaser without knowledge of any defenses. *Converse v. City of Fort Scott*, 92 U. S. 503, 23 L. Ed. 621.

Failure to observe forms of proceedings imposed by legislature.

210. (*Kan.* 1876.) "Municipal officers cannot rightfully dispense with any of the essential forms of proceeding which the legislature has prescribed for the purpose of investing them with power to act in the matter of such a subscription. If they do, the bonds they issue will be invalid in the hands of all that cannot claim protection as bona fide holders." *McClure v. Township of Oxford*, 94 U. S. 429, 24 L. Ed. 129.

Official misconduct; irregularity; fraud on part of agents of corporation; bona fide holder protected, when authority exists.

211. (Ill. 1876.) "The case shows that the plaintiff below was the bona fide owner of the coupons sued on. Questions of form merely or irregularity, or fraud, or misconduct on the part of the agents of the town, cannot therefore be considered. Whether the supervisor of the town signed the bonds during the midnight hours, whether he delivered them at about daylight on the morning of April 2, 1873, and whether he immediately left the town to avoid the service of an injunction, are matters not chargeable to the owner of the bonds. The supervisor was not his agent, but the agent of the town, and if there has been misconduct on his part, the town rather than a stranger must bear the consequences. There must be authority in the town to issue the bonds by the statutes of the State. If this cannot be found, the holder must fail; if it exists, he is entitled to recover." *Town of East Lincoln v. Davenport*, 94 U. S. 801, 24 L. Ed. 322.

Insufficient notice of election.

212. (Ill. 1877.) "Are the bonds so absolutely void, as against the county, as to be invalid under all circumstances, even in the hands of a bona fide holder for value?"

"We have substantially held that if a municipal body has lawful power to issue bonds or other negotiable securities dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has a right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds themselves, by the authorities whose primary duty it is to ascertain it. *Commissioners of Johnson County v. January*, 94 U. S. 202; *Commissioners of Douglass County v. Bolles*, 94 U. S. 104, 108; *Town of Coloma v. Eaves*, 92 U. S. 484, 488; *Lynde v. The County*, 16 Wall. 6. Now, that is the case here. The bonds are executed by the board of supervisors, or, which is the same thing, by their clerk, under their order and direction. They certify on their face that they are issued in conformity with the vote of the electors of

said county, cast at an election held on the 23d day of September, 1869. This, according to the cases, is a sufficient authentication of the fact that an election was duly held, to protect a bona fide holder for value." *County of Warren v. Marcy*, 97 U. S. 96, 24 L. Ed. 977.

Irregularities distinguished from absence of power.

213. (Mo. 1878.) "These bonds are securities which pass from hand to hand with the immunity given by the common law to bills of exchange and promissory notes. The persons who execute and deliver them — the officers of the County Court in this instance — are the agents of the municipal body authorizing their issue, and not of the persons who purchase or receive them. If these agents exceed their authority as to form, manner, detail, or circumstance, if they execute it in an irregular manner, it is the misfortune of the town or county, and not of the purchaser; the loss must fall on those whom they represent and not on those who deal with them. There must indeed be power, which, if formally and duly exercised, will bind the county or town. No bona fides can dispense with this, and no recital can excuse it. Thus, if the Constitution or the statute should peremptorily prohibit a municipal body from loaning its credit to or subscribing for stock in a railroad corporation, a subscription or a loan made subsequently to the passage of the act would give no right against the county, although the bond should recite that there was such authority, and the purchaser should pay full value in the belief of its truth. There is no difficulty in appreciating the distinction stated; and we are now to ascertain whether the error we are considering, assuming it to be one, arises from an irregularity in the exercise of an existing power, or whether there is total want of authority to act." *County of Daviess v. Huidekoper*, 98 U. S. 98, 25 L. Ed. 112.

Bonds for the purpose of developing natural resources of city for manufacturing; recital of titles of ordinances providing for loan for "municipal purposes;" estoppel.

214. (Ill. 1878.) Bonds were issued by the city of Ottawa pledging the

faith of the city, purporting to have been issued in pursuance of the power which the council possessed to borrow money on the credit of the city and issue bonds therefor, and in accordance with certain ordinances which provided for a loan for municipal purposes. The titles of the ordinances quoted in the bonds indicated that the bonds were issued for the purpose of developing the natural resources of the city for manufacturing purposes.

"In view of the course of decisions in Illinois, we should hesitate to declare that money borrowed by the city of Ottawa and expended in developing its natural resources for manufacturing purposes was not, in the sense of the Illinois Constitution of 1848, as interpreted by the Supreme Court of that State, expended 'to promote the general prosperity and welfare of the municipality.'

"But a direct decision of that question does not seem to be essential to the disposition of this case. We content ourselves with stating the propositions which counsel have urged upon our consideration, and without expressing any settled opinion as to what are corporate purposes within the meaning of the Illinois Constitution, we pass to another point, which, in our judgment, is fatal to the defense. It is consistent with the pleas filed by the city that the testator of plaintiffs in error purchased the bonds before maturity for a valuable consideration, without any notice of want of authority in the city to issue them, and without any information as to the objects to which their proceeds were to be applied, beyond that furnished by the recited titles of the ordinances. For all corporate purposes, as we have seen, the council, if so instructed by a majority of voters attending at an election for that purpose, had undoubted authority, under the charter of the city, to borrow money upon its credit and to issue bonds therefor. The bonds in suit, by their recital of the titles of the ordinances under which they were issued, in effect assured the purchaser that they were to be used for municipal purposes, with the previous sanction, duly given, of a majority of the legal voters of the city. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was relieved from

any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinances under which they were issued were ordinances 'providing for a loan for municipal purposes.' Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith on their part, and induce the purchaser to omit an examination of the ordinances themselves. It was substantially a declaration by the city, with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is therefore estopped, by its own representations, to say, as against a bona fide holder of the bonds, that they were not issued or used for municipal or corporate purposes." *Hackett v. Ottawa*, 99 U. S. 86, 25 L. Ed. 363.

Railroad aid; conditional subscription; bona fide holder not bound by notice of; failure of railroad company to comply with conditions; fraud of corporate officers; estoppel.

215. (Ill. 1878.) "The facts set out in the second plea do not constitute a defense to this action. It is not averred in that plea that the insurance company had, at the time it purchased the coupons in suit, any knowledge or actual notice of the special conditions embodied in the election notice, and repeated in the formal subscription of May 23, 1870. Nor is it therein alleged that the bonds to which these coupons were originally attached contained recitals indicating that the subscription had been voted and made upon any conditions whatever. The defendant in error was undoubtedly bound to take notice of the provisions of the statute under which the bonds had been issued. But it was under no legal obligation to inquire as to the precise form or terms of the subscription, whether it was absolute or only conditional."

"It is now too late for the town to claim exemption, as against bona fide purchasers, upon the ground that the railroad company disregarded its promise to construct the road, or upon the ground that its own officers delivered the bonds in violation of special

conditions of which the purchasers had no knowledge or notice either from the statute or otherwise. The remedy of the city is against the railroad company, and its own unfaithful officers, who, it is alleged, were in fraudulent combination with the company." *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416.

Payment for bonds in purchaser's notes.

216. (N. Y. 1878.) "We have already adverted to the good faith of the defendant in error as a purchaser. When he bought he gave his negotiable notes, payable at different times, for the purchase money. The consideration was sufficient. 1 *Daniel Negotiable Securities*, 584."

Bonds irregularly issued not necessarily void.

"The important question here is, whether the bonds were wholly void — like a promissory note given for a gaming consideration, and made a nullity by statute — or whether they were of such a character that a bona fide holder could enforce them like any other commercial security free from infirmity. It is not denied that the statutory authority to issue them under the circumstances designated was ample and valid. In this respect our attention has been called to no defect; no question has been raised upon the subject."

"Where one of two innocent persons must suffer a loss, and one of them has contributed to produce it, the law throws the burden upon him, and not upon the other party." *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404.

Railroad aid; irregularity in calling election.

217. (Ill. 1879.) A law of Illinois authorized the issuing of bonds by a town to pay for a subscription to the capital stock of a railroad company, on a vote of a majority of the electors of the town, to be called upon petition of twenty legal voters therein and held after twenty days' notice. The law also provided that "no mistake in the giving of notice, or in the canvass or return of votes, or in the signing of the bonds, shall in any way invalidate the bonds so issued; provided that there is a majority of the

voters at such election in favor of such subscription." An election was called in Roberts township on the question of subscribing to the stock of the H. L. & E. Railroad Company, on a petition signed by only twelve legal voters, and was held after but ten days' notice, resulting in a majority vote in favor of the subscription and issuing of bonds, and bonds were issued containing recitals that they were issued in accordance with the laws of the State and the election held in pursuance of the law. After said election had been held, the legislature of Illinois passed an act declaring that subscriptions made by certain townships, including Roberts township, to the stock of said railroad company "be each legalized and are hereby made valid and binding, according to the terms thereof, and the several supervisors of said townships shall issue, in due form, the bonds of their respective townships for the amount of stock subscribed for according to the terms and conditions of said subscription, and shall deliver said bonds to said railroad company." Held, that independently of said curative act, the bonds were not invalid on account of the petition of the electors being signed by only twelve instead of twenty legal voters, and the notice of the election being for ten days instead of twenty days. *Roberts v. Bolles*, 101 U. S. 119, 25 L. Ed. 880.

Exchanging bonds for railroad stock, instead of selling them.

218. (N. Y. 1879.) It was contended that bonds were void because, instead of selling them and paying for the stock with the proceeds, as the law directed, the town exchanged the bonds for the stock. The plaintiff did not stand in the relation of a bona fide holder. Held, following the rule of decision of the highest court of the State, that the exchange was a material departure from the requirements of the law, and that the plaintiff was not entitled to recover. *Scinio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037.

Misnomer of railroad company in petition for election: does not invalidate election or bonds issued pursuant thereto.

219. (Ill. 1881.) A mistake in naming a railroad company in a petition

for an election on the proposition to donate the bonds of the county to the company does not invalidate the election nor the bonds issued in pursuance thereof, when the name given indicates the company intended, especially when the records of the board give the correct name.

"Even a contract is not avoided by misnaming the corporation with which it is made. *Hoboken Building Association v. Martin*, 2 Beas. (N. J.) 427. And if a corporation is misnamed in a statute, the statute is not thereby rendered inoperative if there is enough from which to ascertain what corporation is meant. *Chancellor of Oxford's Case*, 10 Rep. 53. 'Although the names of corporations are not mere arbitrary sounds, yet if there be enough to show that there is such an artificial being, and to distinguish it from all others, the body politic is well named, though the words and syllables are varied from.' *Bacon's Abr.* tit. Corporation, C. 2. And it has been held by the Supreme Court of Illinois that the transposition of words comprising the name of a corporation is unimportant, if it be evident what corporation is intended. *Chadsey v. McCreery*, 27 Ill. 253." *County of Moultrie v. Fairfield*, 105 U. S. 370, 26 L. Ed. 945.

Irregularity in conduct of election; railroad-aid bonds; recitals in bonds of compliance with law; estoppel.

220. (Ill. 1882.) Bonds were issued by Pana township, as a donation to a railroad company, under authority of a statute conferring such power. In an action on bonds against the township by a bona fide holder, it was urged as a defense that the election held on the proposition of issuing the bonds was presided over and the returns made not by the supervisor, assessor, and collector of the township, ex-officio judges of the election, but by a moderator chosen by the electors present, and that for this reason there was no legal election, as required by the Constitution of Illinois adopted July 2, 1870, and that the township officers, for that reason, had no authority to issue the bonds. The bonds recited on their face that they were issued by the township in compliance with the vote of the electors thereof, at an election held on April 30, 1870,

under and by virtue of authority conferred by acts of the general assembly of the State, specifying the acts of February 26, 1867, and February 24, 1869.

"This court has again and again decided that, if a municipal body has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has the right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds by the authorities whose primary duty it is to ascertain it."

"The authority to issue the bonds in question in this case, resting upon the fact that an election was held in pursuance of law before a certain date, namely, the date when the Constitution of 1870 was adopted, and the bonds reciting on their face the fact that the election was so held before the date mentioned, the circumstance that the election was irregularly conducted can be of no avail as a defense to the bonds in a suit brought by a bona fide holder."

"Our conclusion is therefore that the bonds in question in this case are valid in the hands of a bona fide holder, notwithstanding the irregularity in the conduct of the election by which they were claimed to be authorized." *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. Rep. 704, 27 L. Ed. 424.

Conduct of election to vote on proposition to issue bonds.

221. (Ill. 1886.) A defense was interposed in an action on bonds issued by a town, on the ground that the election at which they were voted was presided over by a moderator and not by judges of election.

"We are of opinion that, under the act of 1869, the election in a town could properly be conducted in the manner prescribed by law for the election in towns of town officers, namely, by a moderator and the town clerk, the town clerk having given, as required by the act, the prior notice of the election, and the return of the election being filed in the office of the town clerk, and the two officers being paid by the town." *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. Rep. 124, 30 L. Ed. 323.

Noncompliance with mandatory requirements of statute; conditions precedent contained in proposition submitted to voters.

222. (Ill. 1888.) Railroad-aid bonds were issued by the chairman and clerk of the board of supervisors of Franklin county, reciting that they were "issued under the provisions of an act to authorize cities and counties to subscribe to the stock of railroads," approved November 6, 1849, and by a majority of the qualified voters of said county of Franklin at an election held in said county on the 11th day of September, 1869, in accordance with the provisions of said act. The bonds were held by a bona fide purchaser without notice of any defense thereto. There was indorsed on the bonds the certificate of the auditor of the State that they had been registered in his office.

The Supreme Court of Illinois, before these bonds were issued, decided, in a case before it, that bonds issued without a compliance with conditions precedent prescribed in the act of April 16, 1869, were void in whosoever hands they might be. Held, following the decision of the Supreme Court of Illinois, that the bonds were void for the reason that the requirements of said act of April 16, 1869, had not been observed, in that the conditions approved by the electors of the county at the election held to vote on the question of their issuance had not been complied with. *German Sav. Bank v. Franklin County*, 128 U. S. 526, 9 Sup. Ct. Rep. 159, 32 L. Ed. 519.

Noncompliance with mandatory requirements of statute as to form and contents of petition for issuance of bonds; purchaser charged with notice.

223. (N. Y. 1890.) A statute of New York, authorizing the issuance of bonds by municipal corporations, required that an application therefor should be made to the county judge of the county by a petition signed by a majority of the taxpayers of the corporation, "who are taxed or assessed for property, not including those taxed for dogs or highway tax only;" to be verified by one of the petitioners, setting forth that they are such majority of the taxpayers, and are taxed and assessed for, or represent, such majority of taxable prop-

erty, etc. Held, that compliance with these requirements was jurisdictional, and that, as the petition in this case had not conformed to the requirements of the statute, in that it failed to state that the petitioners were a majority of such taxpayers as were defined in the act, the County Court was without authority to make any finding or order thereon for the issuance of the bonds, and that all proceedings and orders based upon such petition, and the bonds issued in pursuance thereof, were void. *Rich v. Mentz Township*, 134 U. S. 632, 10 Sup. Ct. Rep. 610, 33 L. Ed. 1074.

Increasing indebtedness by selling funding bonds.

224. (Iowa, 1892.) A statute of Iowa, authorizing school districts to issue negotiable bonds to fund their indebtedness, provided that, "The treasurer of such district is hereby authorized to sell the bonds provided for in this act at not less than their par value, and apply the proceeds thereof to the payment of the outstanding bonded indebtedness of the district, or he may exchange such bonds for outstanding bonds, par for par." Held, "there is a wide difference in the two alternatives which this statute undertakes to authorize. The second alternative of exchanging bonds issued under the statute for outstanding bonds, by which the new bonds, as soon as issued to the holders of the old ones, would be a substitute for and an extinguishment of them, so that the aggregate outstanding indebtedness of the corporation would not be increased, might be consistent with the Constitution. But, under the first alternative, by which the treasurer is authorized to sell the new bonds, and to apply the proceeds of the sale to the payment of the outstanding ones, it is evident that if (as in case at bar) new bonds are issued without a cancellation or surrender of the old ones, the aggregate debt outstanding, and on which the corporation is liable to be sued, is at once and necessarily increased, and, if new bonds, equal in amount to the old ones, are so issued at one time, is doubled; and that it will remain at the increased amount until the proceeds of the new bonds are applied to the payment of the old ones, or until some of the obligations are otherwise discharged." *Doon Township v. Cum-*

mins, 142 U. S. 366, 12 Sup. Ct. Rep. 220, 35 L. Ed. 1044.

Subscription to railroad stock; conditions; estoppel to set up nonperformance of conditions imposed by municipality; waiver.

225. (Ill. 1896.) "It must be admitted, as well-settled law, that where there is a total want of power to subscribe for stock and to issue bonds in payment, a municipality cannot estop itself from raising such a defense by admissions, or by issuing securities negotiable in form, nor even by receiving and enjoying the proceeds of such bonds. So, too, it may be admitted that, even where the power to subscribe for stock and to issue bonds in payment was validly granted, yet where the right to exercise the power has been subjected to conditions prescribed by the legislature, the municipality cannot dispense with or waive such conditions.

"But where the municipality is empowered to subscribe with or without conditions, as it may think fit, and where the conditions are such as it chooses to impose, there seems to be no good reason why it may not be competent for such municipality to waive such self-imposed conditions, provided, of course, such waiver is by the municipality acting as the principal, and not by mere agents or official persons. Such was the present case." *Graves v. Saline County*, 161 U. S. 359, 16 Sup. Ct. Rep. 526, 40 L. Ed. 732.

Subscription to railroad stock; exchange of stock for small part of bonds issued; held a donation; bonds void.

226. (Ill. 1892.) The laws of Illinois authorized counties to subscribe to the capital stock of railroad companies and to issue county bonds in payment of the amount so subscribed, when authorized by a majority vote of the legal voters of the county. The voters of Pulaski county authorized the County Court of that county to subscribe for \$100,000 of the capital stock of the C. & V. Railroad Company, and to issue bonds of the county in that amount. The County Court, however, agreed with the railroad company to sell the company the \$100,000 of stock to be issued to the county in consideration of the return to the county of \$5,000

of its bonds, and the arrangement was carried out. In an action upon interest coupons of such bonds, held that the transaction was in effect a donation by the county of \$95,000 of its bonds to the railroad company, and, as there was no legal authority for making such donation, the bonds were void. *Post v. Pulaski County*, 1 C. C. A. 405, 49 Fed. 628, 9 U. S. App. 1.

Unlawful use of proceeds of bonds; false recitals of compliance with conditions; estoppel; constitutional requirement as to provision for collection of tax; irregular exercise of power distinguished from absence of power.

227. (S. Dak. 1894.) The board of education of the city of Huron, having authority to issue bonds for the purpose of raising means with which to purchase sites and erect school-houses, issued bonds represented to be for that purpose, and containing recitals "that all conditions and things required to be done, precedent to and in the issuing of said bonds, have duly happened and been performed in regular and due form as required by law." The bonds were in fact issued and sold for the purpose of loaning the proceeds to the city of Huron for warrants which were never paid, and which could not be collected.

"One of the conditions and things required to be done precedent to and in the issuing of the bonds was to provide, in accordance with this constitutional requirement, for the collection of an annual tax to pay the principal and interest of the bonds. The defendant certified on the face of these bonds that this thing had been done. On this certificate, the present holders bought the bonds. Can the defendant now prove the falsity of this certificate to defeat them?" Held, the defendant was estopped to assert the falsity of the recitals to defeat the bonds; that, having authority to pass an ordinance or resolution to provide for the collection of the necessary taxes, their recital was conclusive that the necessary provision had been made; and, further, the bonds having been issued ostensibly for a legal purpose, it was no defense to urge that they had been in fact issued for an illegal purpose, in an action brought by a bona fide holder of the bonds.

"An ordinance or resolution of this board, passed at or before the issuance of the bonds, providing for the collection of such an annual tax until the bonds and coupons were paid, would have complied with the provision of the Constitution. If this was not passed, it was not from lack of power in the board, but from a failure on its part to exercise the power with which it was vested in the manner provided by the Constitution. It is this difference between the inadequate exercise of ample power and the total absence of power to be exercised that widely separates this case from *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315 (28 L. Ed. 360); *Northern Bank of Toledo v. Porter Tp. Trustees*, 110 U. S. 608, 4 Sup. Ct. Rep. 254 (28 L. Ed. 258); *McClure v. Township of Oxford*, 94 U. S. 429 (24 L. Ed. 129); *Lake County v. Graham*, 130 U. S. 674, 9 Sup. Ct. Rep. 654 (32 L. Ed. 1065); *Nesbit v. Independent Dist.*, 144 U. S. 610, 617, 12 Sup. Ct. Rep. 746 (36 L. Ed. 562); *Sutliff v. Comrs.*, 147 U. S. 230, 235, 13 Sup. Ct. Rep. 318 (37 L. Ed. 145); and *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. Rep. 71 (37 L. Ed. 1044), cited by counsel for defendant." *National Life Ins. Co. of Montpelier v. Board of Education of City of Huron*, 10 C. C. A. 637, 62 Fed. 778.

Noncompliance with constitutional requirement to make provision for levying tax.

228. (Tex. 1894.) The omission to make provision at or before the issuance of bonds by a county in Texas for the levy and collection of a tax to pay the interest and to create a sinking fund for the payment of the principal of the bonds issued under authority of a statute of Texas did not render the bonds void. "On the contrary, it appears that the authority given the specially-named commissioners to contract the debt was full and complete, and the duty was imposed on the county government to execute the bonds to meet the debt, and to provide for the interest and required sinking fund before issuing the bonds. The power to provide the courthouse and jail is not made contingent on any action by the county. The contractor who erected the buildings might be paid in the bonds of the county or out of the proceeds of the sale of its

bonds; but the county could not, by its refusal to execute the bonds, or by its refusal or neglect to provide for the levy and collection of a tax sufficient to meet the interest and sinking fund, defeat the execution of the power conferred by the statute to provide a courthouse and jail for the county. These necessary public grounds and buildings were secured; the bonds were executed and issued, and, at the January term, 1874, of the proper court of the county, an order was made and entered levying a tax to pay the interest and sinking fund, and the tax was collected annually for several years thereafter. We see no ground to question the validity of the bonds." *Marion County v. Coler*, 14 C. C. A. 301, 67 Fed. 60.

Tax assessment not completed within time allowed by law.

229. (S. Car. 1895.) "Those whose property was so assessed, who were required to pay the taxes, and who were familiar with the mode of making and returning the assessment, made no complaint, while the authorities of the town ratified the assessment, and confirmed the legality of the return by laying and collecting the tax. It would not be proper to now permit those who so made the assessment, and who imposed, collected, and enjoyed the benefits of the tax levied by virtue of the same, to question the validity of their own act." *Town of Darlington v. Atlantic Trust Co.*, 16 C. C. A. 28, 68 Fed. 849.

Irregularities in providing for improvements and special assessments; diversion of proceeds; no defense to bonds.

230. (Mich. 1895.) There being legal authority for a city to issue its bonds, in anticipation of special assessments levied for street improvements, irregularities in proceedings providing for such improvements and in making such assessments, and levying assessments in excess of the statutory limitation, constitute no ground of defense by the city to the collection of bonds so issued, when such special assessments have been collected by the city.

The wrongful diversion by a city of the proceeds of special assessments, in anticipation of which its bonds were issued to other purposes than the payment of such bonds, is no de-

fense to their collection. It is no defense to an action on bonds of the city by an innocent holder that, when they were sold by the city, an agreement, in violation of law, was made with the treasurer of the city, to pay him a commission for making such sale. *City of Gladstone v. Throop*, 71 Fed. 341, 18 C. C. A. 61.

Noncompliance with precedent conditions; unauthorized delivery of bonds.

231. (Ky. 1896.) An act of the legislature of Kentucky, authorizing Mercer county to issue its bonds in aid of a railroad, declared that the bonds "Shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company," and further provided that "Such bonds shall be deposited with a trustee or trust company, to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county." Held, that such construction of the road to a point within the county, but not through the county from one side to the opposite side, was not a compliance with the statutory condition; and that, under such circumstances, the delivery of the bonds by the trustee with whom they were deposited in escrow after their execution by the proper officers, and who was designated to deliver them when the condition should be complied with, was in violation of his duty and without authority of law. Held, also, that a purchaser of such bonds in the open market, with no actual knowledge that the said condition had not been complied with, is not protected by recitals of the bonds importing a compliance with the act authorizing their issuance. "Looking to the act referred to, as the purchaser was bound to do, he discovered that these bonds were to be executed and deposited in escrow, and delivered only upon the completion of the Louisville Southern railroad through the county of Mercer. By this provision he was advised that the recital that the bond 'was issued pursuant to the authority' of the act referred to was a recital which, in

the nature of things, could only refer to facts antecedent to the deposit of the bonds in escrow, and could not possibly operate as a recital covering the subsequent completion of the railroad through the county. The enabling act operated as notice to him that the bonds were not 'binding and valid obligations' when placed in escrow, and would not become valid and legal securities 'until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same.' The purchaser therefore bought with notice that the depository held the bonds 'in escrow,' and had no power to deliver them until the company should 'become entitled to the same by the construction of its road through the county.' The recitals in the bonds must therefore be referred to the acts which, under the permissive law, were to precede the execution and deposit of the bonds in escrow, and do not operate as a recital of facts which could not have existed when they were made. Where recitals are relied upon to cut off the defense that municipal bonds are in fact issued without authority of law, or in violation of law, they should be fairly and reasonably construed, and be such as to clearly indicate that the conditions and requisites of the law have been complied with." Held, also, that such trustee's delivery of the bonds was not binding upon the county as a decision that the precedent condition had been complied with, as he was not authorized to make such decision. Held, also, that purchasers of such bonds bought them with notice by the statute that they had been deposited in escrow, and that their delivery was subject to a condition. Held, also, that payment of interest upon the bonds for a time by the county did not validate them, as "ratification can only be effective when the party ratifying possesses the power to perform the act ratified." *Mercer County v. Provident Life & Trust Co. of Philadelphia*, 19 C. C. A. 44, 72 Fed. 623.

Noncompliance with constitutional requirement to provide for levy and collection of tax at time of incurring indebtedness.

232. (Tex. 1897.) A contract was entered into between the county of Brazoria, Texas, and the Youngstown

Bridge Company, for the construction by the bridge company of bridges for the county, to be paid for in bonds of the county. No provision was made by the county, at the time of entering into the contract, for levying and collecting a sufficient tax to pay the interest upon the debt thereby incurred by the county, and to provide a sinking fund for the payment of the debt, as required by the Constitution of Texas. Held, following the decisions of the Supreme Court of Texas, that said contract was void because of the failure to make such provision. *Brazoria County v. Youngstown Bridge Co.*, 25 C. C. A. 306, 80 Fed. 10; *Wade v. Travis County, Tex.*, 26 C. C. A. 589, 81 Fed. 742. But see *Wade v. Travis County*, 174 U. S. 499, 19 Sup. Ct. 715, 43 L. Ed. 1060, reversing the decision in this case.

Failure to officially canvass vote.

233. (Kan. 1898.) Ingalls township, Kansas, issued refunding bonds containing recitals that they were "issued by virtue of and in accordance with the provisions of sections 1, 2, and 3 of chapter 50 of the Laws of 1879, being an act of the legislature of the State of Kansas, entitled 'An act to enable counties, municipal corporations, the boards of education of any city, and school districts to refund their indebtedness,' which said act took effect March 10, 1879; and it is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of said bonds, have been done, happened, and performed, in regular and in due form, as required by law."

The act referred to required the assent of the legal voters of the township to the issuance of such bonds. An election was duly called and held, resulting in favor of the issuance of the bonds, but the votes were not canvassed by the county commissioners as the law required. Held, that the failure of the county commissioners to canvass the vote could not avail the township as a defense to the bonds in the hands of a bona fide holder. *Brown v. Ingalls Tp., Kan.*, 30 C. C. A. 27, 86 Fed. 261.

Bonds exceeding limit imposed by organic territorial act held valid.

234. (S. Dak. 1898.) Refunding bonds evidencing a debt in excess of

limitation imposed by organic territorial act held valid in view of the recitals contained in them, raising an estoppel in favor of a bona fide holder. *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272.

Authority to borrow money and to issue bonds held to be a general authority; bonds to refund "floating indebtedness;" estoppel by recitals to show illegality of warrants refunded.

235. (S. Dak. 1898.) By its charter, the city of Huron was authorized "to appropriate money and provide for the payment of the expenses and indebtedness of the corporation," and was further authorized "to borrow money, and for that purpose to issue bonds of the city in such denominations, for such length of time, not to exceed twenty years, and bearing such rate of interest, not to exceed 7 per cent. per annum, as the city council may deem best."

August 5, 1889, in pursuance of a vote of the electors of the city, at an election held April 2, 1889, the city, by action of its council, issued its negotiable bonds, which contained the recital that they were "issued for the purpose of funding the floating indebtedness of the city of Huron."

The bonds were in fact issued, and their proceeds were used to pay off city warrants which had been theretofore issued for a purpose not authorized by law, and which were therefore void. In an action upon coupons cut from some of the funding bonds by a bona fide holder of the bonds, it was urged by the city that the bonds were void, for the reason that the original debt was illegal, and that there was no authority to refund an illegal debt. Held, that the charter power conferred to borrow money and issue bonds was not special, but was general, for all municipal purposes, and included the power to issue bonds to pay or refund the indebtedness of the municipality, and that the city was estopped by the recitals in the bonds from showing the illegality of the debt refunded. *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272.

To the same effect: (Kan. 1898.) *Board of Comrs. of Seward County, Kan. v. Aetna Life Ins. Co.*, 32 C. C. A. 585, 90 Fed. 222.

Bridge not wholly within the limits of city; fixing location by secretary of war.

236. (Minn. 1898.) "With respect to the claim that the bonds in controversy were invalid, because the bridge as projected did not lie wholly within the corporate limits of the city of South St. Paul, and that they were further affected by the fact that, at the date of their issue, the secretary of war had not fixed the exact location of the structure or approved of the proposed location, it may be said, in this connection, that neither of these considerations can be held to have impaired the validity of the bonds. Such conditions could in no event impair their validity in the hands of an innocent purchaser for value." *City of South St. Paul v. Lamprecht Bros.*, 31 C. C. A. 585, 88 Fed. 449.

Selling bonds on credit; no defense to their collection.

237. (N. Y. 1899.) "The bonds in suit were issued and negotiated conformably in all respects to the provisions of the act but one. They were negotiated at par, but not for cash, and under an agreement with the purchaser that, as to a portion of the price, payment might be deferred and collateral securities substituted meanwhile. Assuming this to have been a departure from the statutory requirement, as the plaintiff was a bona fide holder of the bonds, without notice of the deviation by the agents of the town from the terms of their authority, the facts did not afford any defense to his action." *Town of Greenburg v. International Trust Co.*, 30 C. C. A. 471, 94 Fed. 755.

Irregular organization of precinct; irregular proposition submitted to voters; recitals in bonds of compliance with law; bona fide holder; estoppel.

238. (Nebr. 1900.) It is no defense to the enforcement of bonds issued by the board of commissioners of a county in Nebraska, not under township organization, on account of a precinct in such county, that the organization of such precinct had not complied with the law, in that the lines of the precinct did not correspond with the lines of the wards of a city which was located upon a portion of the precinct.

In an action by a bona fide holder of such bonds against the county, it was urged as a defense that the bonds were void for want of legal authority to issue them, for the reason that the proposition for their issuance submitted to the voters of the precinct contained the words: "The said bonds, when signed as required by law, to be delivered to William E. Hill, Robert Payne, and F. W. Rottman, as trustees for the persons who shall have paid for the right of way and depot grounds aforesaid;" and because the bonds were delivered to them, and the proceeds of them were applied to the purpose there indicated.

"But these facts do not appear upon the face of the bonds, and they contain not only the recital which we have heretofore quoted, to the effect that all the requirements of the law necessary to authorize the issue and delivery of the bonds had been fully complied with, but also this statement: 'This bond is one of forty of like date, issued to aid in the construction of the Missouri Pacific Railway Company's railroad through said Nebraska City precinct, by purchase of right of way and grounds for depot therein.' These recitals import that the bonds were issued in pursuance of a lawful and proper proposition, of a legal vote of the electors of the precinct, and of honest and just action on the part of the board of county commissioners under the statute. They relieve the innocent purchaser of all inquiry, notice, and knowledge of the actual proposition submitted, and of the action of the board thereon, and estop the county and the inhabitants of the precinct from denying that a legal proposition was submitted and sustained by a vote of the electors, and that the bonds are based upon such action."

"Nor is it any defense to the action of this innocent purchaser that the board of county commissioners of Otoe county certified upon the face of the bonds that they were issued for a lawful purpose, but actually issued them and applied their proceeds to an unlawful purpose." *Clapp v. Otoe County, Nebr.*, 45 C. C. A. 579, 104 Fed. 473.

Sale of bonds on credit.

239. (N. Y. 1900.) It is no defense to municipal bonds held by a bona

fide purchaser that such bonds were originally sold on credit and the municipality never received payment therefor. *D'Esterre v. City of New York, et al.*, 44 C. C. A. 75, 104 Fed. 605.

Time of organization of county as affecting power to issue bonds.

240. (Kan. 1901.) A statute of Kansas provided that, "No bonds, except for the erection and furnishing of schoolhouses shall be voted for and issued by any county, or township, within one year after the organization of such new county under the provisions of this act." Held, that bonds voted for by a township within a year after the organization of the county, but actually issued after the expiration of the year, in satisfaction of a subscription by the township to the capital stock of a railroad company, were so issued without legal authority, and were void, and that, the date of the election appearing upon their face, purchasers were charged with notice of their invalidity. *Sage v. Fargo Township*, 107 Fed. 383, 40 C. C. A. 361.

Fraud of municipal officers in issuance of bonds; when no defense.

241. (Colo. 1905.) "Parol testimony was offered to sustain the defense of fraudulent conspiracy between the mayor and certain trustees, but it was excluded by the Circuit Court. This ruling was correct. There was an agreement between the parties that the defendant in error was a bona fide purchaser of the coupons in the open market, 'without any knowledge of their invalidity save and except such as appears upon the records of the town of Fletcher.' There was no evidence in the town records of such conspiracy, or of any fraudulent or unlawful act in connection with the execution or delivery of the bonds with their attached coupons. The law of the State authorized the issue of bonds for the purchase of water works, the ordinance required by the statute was duly adopted and published, the purchase of the water works was made, and the negotiable bonds of the town were issued. So far as the records showed, all of the conditions surrounding the due exercise of the statutory power conferred upon the board of trustees had been performed. Under the stipulation of the parties the defendant in error was cognizant of these things, but ignorant of all else affecting the validity of the bonds or

the coupons, which he purchased in good faith. Under such circumstances it was not his duty to go behind the records of the municipality, and inquire into the conduct and motives of public officials, who, being invested with authority to act, had apparently conducted themselves within its limitations." *Town of Fletcher v. Hickman*, 136 Fed. 568, 69 C. C. A. 350.

Bonds reciting unauthorized purpose. Voting on bonds for combined or alternative purposes.

242. (Minn. 1906.) Bonds were issued reciting that they were issued "for the purpose of constructing and improving roads and bridges of said town, as authorized by more than a two-thirds vote of all the votes cast at a special township meeting called for that purpose" whereas the enabling act authorized the issuance of bonds solely for "building bridges."

"This recitation discloses that the bonds were issued for the unauthorized purpose of constructing and improving roads and improving bridges as well as for the sole purpose for which the town was authorized by law to issue them, of 'building bridges.' It also discloses that there is substantial merit in the defense of these bonds. The legal voters of the town, who alone were empowered to authorize their issue had no opportunity to vote on the proposition, whether the town should incur the indebtedness and issue its bonds for the sole purpose permitted by law. The town meeting was called to consider the proposition of issuing bonds for the fourfold combined purpose just stated, and on this proposition the vote appears to have been taken.

"The mere fact that the bonds were voted for and issued for one lawful purpose out of the four purposes specified in the call and recited on the face of the bonds, does not justify the issue of the bonds for the combined purposes mentioned. *Elyria Gas & Water Co. v. City of Elyria*, 57 Ohio St. 374, 49 N. E. 335. They were issued without a legal vote of the township, and for purposes unauthorized by law and are void. There is no question in this case concerning the rights of innocent purchasers. The plaintiff does not stand in that attitude. He purchased the bonds with the nullifying recitation on their face, and was bound to take notice thereof." *Clagett v. Duluth Tp.*, 74 C. C. A. 620, 143 Fed. 824.

Authority to issue bonds, conditional; determination as to performance of condition; condition or covenant.

243. (Ky. 1907.) Action at law on railroad aid bonds of a county.

"The questions to be decided upon the facts found, the substance of which has been stated, and the proper inferences to be drawn therefrom are these: First, whether it should be held that the county of Green had been exonerated from the payment of the subscription for the capital stock of the Elizabethtown & Tennessee Railroad Company; and, second, whether these bonds are invalid in the hands of the plaintiff by reason of the fact that only \$150,000 of the proceeds of the bonds have been expended in the construction of the road in Green county, or by reason of the fact that the same has not been built through the county. These questions turn largely upon the proper interpretation of the so-called conditions upon which the county authorized these bonds to be issued."

- "We agree that the exoneration of Green county from any liability on account of its former subscription to another railroad was a condition precedent to the issuance of the bonds, and that without the accomplishment of this condition the plaintiff cannot recover. We concede this, although we cannot help thinking that there is room for the belief that the legislature of Kentucky intended that the county judge should determine when and whether the condition had been accomplished, and that to hold otherwise is to suppose that these bonds, although they were by the terms of the statute to be negotiable coupon bonds, would, although issued and put upon the market, yet be clogged with doubt of their validity, a doubt which even now might be and still is urged against them. Such bonds would not be marketable, and their purpose would be utterly defeated. For this reason it has sometimes been held that, although the statute does not expressly nominate any officer who is to pass upon the execution of the condition precedent to the issue of such bonds, yet that, in view of the consequences, an implication might arise that the legislature intended that the officer of the municipality in whose behalf he was acting, and who was charged with the custody and the issuance of the bonds, should, before delivering them, ascertain and determine whether the condition had been complied with.

Especially would this be so when the question whether there had been a compliance is one which calls for the exercise of judgment upon facts with which he would be most conversant. It is true that in most of these cases, perhaps in all, there were recitals in the bonds of the regularity of the anterior proceedings or the fulfillment of conditions precedent; but it would seem that for other reasons, if it is intended by the statute that the determination of the fact is committed to the official who issues the bonds, such determination ought to settle the fact. If in such conditions the bonds should be issued without such determination, the question would be open. But here the county judge acted advisedly. In the order that the bonds be issued, he recites that he was sufficiently advised—borrowing an expression from legal procedure—to denote that he had taken notice of and considered the question whether the conditions existed which authorized the issuance of the bonds; in other words, that he had exercised the function devolved upon him. Granting, what must be regarded as settled by authority, that when the condition consists of a distinct and indubitable fact, and nothing is left to the judgment of the official charged with the delivery of the bonds, his delivery of them without the occurrence of the condition would be unauthorized and the bonds be void, yet it would seem upon principle, that if the question whether the condition has been accomplished is one of doubt and uncertainty, and it is apparent that the officer who has charge of the issuance of the bonds is to determine the fact of compliance with the condition, his determination would conclude the question, and, if in the affirmative, bind the county."

"We come then to the question whether the other provisions of the vote on which the bonds in suit were issued, namely, 'that said company shall locate and construct said railroad through said county of Green, * * * and shall expend the amount so subscribed within the limits of Green county,' were conditions precedent to the issue of the bonds, or were stipulations imposed upon the Cumberland & Ohio Railroad Company by its acceptance of the subscription."

"The question whether the performance of a stipulation in a contract is a condition precedent to the performance of other stipulations in it de-

pends upon the order in which the parties intend the several stipulations to be performed. The calling of a provision or stipulation a condition is not conclusive, and if from the contract or other circumstances it is seen that it was not the intention of the parties that its performance should be a condition precedent it will not be held to be such. *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502; *Union Stockyards Co. v. Nashville Packing Co.*, 140 Fed. 701, 704, 72 C. C. A. 195; *Schier v. Trinity Church*, 100 Mass. 1; *Greene v. O'Connor*, 18 R. I. 56, 25 Atl. 692, 19 L. R. A. 262; *Scovill v. McMahon*, 62 Conn. 378, 26 Atl. 470, 21 L. R. A. 58, 36 Am. St. Rep. 350; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175. 'Conditions have no idiom,' said *Virgin, Judge*, in *Bucksport, etc., R. Co. v. Brewer*, 67 Me. 295. 'Whether they are precedent or subsequent is a question purely of intent, and the intention must be determined by considering not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required and the subject-matter to which it relates.' Conditions are not favored, and a provision will not be construed as such unless the intention is clear. 6 Am. & Eng. Ency. of L. 502; *Clapham v. Moyle*, 1 Lev. 155; *Shep. Touch.* 122; *Huff v. Nickerson*, 27 Me. 106. 'Where the language of an agreement can be resolved into a covenant,' said *Bell, Judge*, in *Paschall v. Passmore*, 15 Pa. 295, 307; 'the judicial inclination is to so construe it; and hence it has resulted that certain features have ever been held essential to the constitution of a condition. In the absence of any of these, it is not permitted to work the destructive effect the law otherwise attributes to it.'

"Other reasons are also suggested by counsel; but we can not doubt that, for those we have mentioned, the proper construction to be given to the proposition submitted to, and authorized by the electors of Green county is that the railroad company should, upon its acceptance of the subscription, and the delivery of the stock by one, and of the bonds of the other, come under an obligation to comply with those terms of the proposition voted. And we reach this conclusion without regard to the question of an estoppel arising upon the fact that the county accepted the stock, and has continued to retain it. If the question of the intention were in doubt, the interpretation given by the county to its vote by paying the

interest would be persuasive of its understanding at the time of the transaction. We think the bonds were lawfully issued, and that the fact that the company has not performed the stipulations of the agreement which it made as a consideration for the bonds does not invalidate them, when, as appears, the delivery of the bonds was final, and they have passed into the hands of other parties for value, as it was the evident intention of the statute that they would do." *Quinlan v. Green County, Ky.*, 84 C. C. A. 537, 157 Fed. 33.

Presumption that a condition precedent has been complied with in issuance of bonds in absence of recitals in bonds.

243a. (Ky. 1907.) "There is no doubt of the power of the defendant to issue the bonds. The legislature of Kentucky gave it in plain terms, upon the condition that its exercise receive the approval of the qualified voters. That approval was given upon the condition imposed by the vote, that the bonds should not be issued before the county had been exonerated from a subscription to the stock of another railroad company. The law gave the county the right to impose conditions. This particular condition is a condition precedent to the lawful issue of the bonds although it must not be understood that this statement applies to the other so-called conditions expressed in the vote. Of them nothing is intended to be said. If there had been a recital in the bonds which imported that the condition had been performed, that would have been conclusive in favor of a bona fide holder. *Provident Life & T. Co. v. Mercer County*, 170 U. S. 593, 42 L. Ed. 1156, 18 Sup. Ct. Rep. 788; *Gunnison County v. E. H. Rollins & Sons*, 173 U. S. 255, 43 L. Ed. 689, 19 Sup. Ct. Rep. 390. But there was no such recital in the body of these bonds, and the words of the heading 'For the Cumberland & Ohio Railroad,' cannot be interpreted as such without going beyond the decided cases, which themselves have gone far. In the absence of a recital it is open to the defendant to show that the condition which it has a right to impose and did impose by the vote of its electors had not been complied with. *Citizens' Sav. & Loan Assn. v. Perry County*, 156 U. S. 692, 39 L. Ed. 585, 15 Sup. Ct. Rep. 547. In other words, in the absence of a recital, the performance of the condition is not conclusively presumed.

"But, by the terms of the law, it

was the duty of the judge of the county court, in whom the powers of the court were vested, to issue the bonds. After a favorable vote has been had in an election called by the court, the law provides that 'it shall be the duty of said county court * * * to make the subscription in the name of their * * * counties * * * and proceed to have issued the bonds to the amount of such subscriptions, as hereinbefore directed.' This clearly placed upon the judge the duty and responsibility of ascertaining and determining whether the condition of the issue of the bonds had been complied with. *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579.

"If he had issued the bonds and they had contained in them recitals which fairly imported a compliance with the condition upon the happening of which their issue was authorized, they would have gone into the hands of innocent holders with a conclusive presumption that the condition had been performed. This principle has been announced by repeated decisions of this court and needs no other citations to support it than those already made. Without such recital the presumption is, as has been shown, not conclusive. The further question arises, therefore, whether there is any presumption at all of the performance of the condition from the facts of subscription and issue."

"Construing the second question to inquire, not whether there is conclusive presumption, but whether, on the facts found, there is any presumption at all that the county had been exonerated from its former subscription to another railroad, we answer it 'Yes.'" *Quinlan v. Green County*, 205 U. S. 410, 27 U. S. Sup. Ct. Rep. 505.

Distinction between absence of legal power and irregular exercise of power.

244. (Colo. 1913.) Bonds were issued by the town of Aurora, containing the following recital:

"It is certified that this issue of bonds is for the purpose of purchasing water works for fire and domestic purposes, and further, that all the provisions of said ordinance and said act have been complied with, and that all acts, conditions and things requisite to be done, precedent to and in the issuing of said bonds have been done, happened and performed in regular and due form as required by law."

In an action on the bonds and coupons it was urged that the town had

no authority to issue the bonds for the reason that the ordinance providing for their issuance had not been published as required by the laws of Colorado.

"The argument against the estoppel by the recital and certificate from proving that the ordinance was not published is twofold. The first runs in this way: In the absence of an ordinance neither the town nor its officers had any power to issue the bonds or to make the recital and certificate therein. The ordinance never was published; therefore it never went into effect; and the bonds, the recitals, and certificates were issued without authority and are void. In support of this contention counsel cites *Post v. Pulaski County*, 49 Fed. 628, 1 C. C. A. 405; *National Bank of Commerce v. Town of Granada*, 54 Fed. 100, 104, 105, 4 C. C. A. 212, 216, 217; *Hinkley v. City of Arkansas City*, 69 Fed. 768, 773, 16 C. C. A. 395, 400; *Town of Aurora v. Hayden*, 23 Colo. App. 1, 126 Pac. 1109; *Peck v. City of Hempstead*, 27 Tex. Civ. App. 80, 65 S. W. 653; and other less pertinent opinions. But the validity of this contention is no longer open to debate in the national courts. It ignores the vital distinction between that total want of power which no act or recital of the municipality or quasi municipality may remedy and the total failure to exercise or the inadequate exercise of a lawful authority. It ignores the essential difference between a total lack of power under the laws under all circumstances and a lack of power which results merely from the absence of the exercise or the inadequate exercise of the power. The former, it is true, cannot be affected by the estoppel of recitals or certificates, but the latter may be.

"A municipality or quasi municipality may not, by the recitals or certificates in its bonds, estop itself from denying that it is without power to issue them when the laws are such that there can be no state of facts or of circumstances under which it would have authority to emit them. But, if the laws are such that there might under any state of facts or of circumstances be lawful power in the municipality or quasi municipality to issue its bonds, it may, by recitals therein, estop itself from denying that those facts or circumstances exist and that it has lawful power to send them forth, unless the constitution or act under which the bonds are issued prescribes some public record as the test, and no such test was prescribed

in this case, of the existence of some of those facts or circumstances."

Following the foregoing the opinion contains an interesting discussion noticing and distinguishing a number of decisions of the Supreme Court and Circuit Courts of Appeals. *Town of Aurora v. Gates*, 125 C. C. A. 329, 208 Fed. 101.

Limit of indebtedness, difference between "taxable value" and value as actually assessed.

244a. (Tenn. 1902.) "It is further contended that the bonds (and coupons) are void for the reason that they were in an amount in excess of ten per cent. of the taxable property of the city. It was shown that they were in excess of ten per cent. of the assessments for 1889, but it is not

shown what was the amount of the assessments for 1890. The bonds were issued May 15, 1890, and for aught that appears the assessment for that year may have been large enough to warrant the issue. But, aside from the effect of the recitals in the bonds upon this question, the statute does not refer to the assessment, but makes the basis the 'taxable property of the city.'

"And it is well known that the taxable value of property and the actual assessment for the purpose of taxation are often very different things. We think therefore, that this question is concluded by the recitals of the bonds in question, and that this ground of defense is unavailable." *Municipal Trust Co. v. Johnson City*, 53 C. C. A. 178, 116 Fed. 458.

D. Powers of Municipal Corporations and Officers De Facto.

De facto railroad corporation.

245. (Kan. 1876.) "Whether the St. Louis, Lawrence & Denver Railroad Company was lawfully a corporation, capable of contracting with the defendants below, is a question that cannot be raised in this case."

"It has been a corporation de facto, at least, if not de jure, from the date of its organization. Its corporate existence therefore and its ability to contract cannot be called in question in a suit brought upon evidences of debt given to it." *Comrs. of Douglas County v. Bolles*, 94 U. S. 104, 24 L. Ed. 46.

Railroad company not organized within time prescribed.

246. (Mo. 1877.) "The objection that the corporation was not organized within the time limited by the charter is unavailing. It is in effect a plea of null corporation. In *Kayser v. Trustees of Bremen*, 16 Mo. 88, the Supreme Court of the State said: 'It cannot be shown in defense to a suit of a corporation that the charter was obtained by fraud; neither can it be shown that the charter has been forfeited by misuser or nonuser. Advantage can only be taken of such forfeiture by process on behalf of the State, instituted directly against the corporation, for the purpose of avoiding its charter; and individuals cannot avail themselves of it in collateral suits until it be judicially declared.' *County of Mason v. Shores*, 97 U. S. 272, 24 L. Ed. 889.

Incomplete organization of railroad company no defense.

247. (Mo. 1878.) "After admitting that it made a contract with this

company to take its stock, and not with some other company, and that the contract with this identical company was authorized with the forms and solemnities set forth, and that it received, and, so far as known, has ever since held and enjoyed, and now holds and enjoys, the profits of the stock of this very company issued for such bonds; and also admitting that when the bonds were so issued and delivered by it the incorporation had been completed in form and detail for one year, can it now be permitted to urge as a defense that such company was not a legally organized corporation when the election was held, and did not become such until after that period?" Held, that the defense could not be sustained. *County of Daviess v. Huidekoper*, 98 U. S. 98, 25 L. Ed. 112.

Organization of railroad company as affecting validity of bonds.

248. (Mo. 1881.) It is no defense to bonds issued by a county in payment of a subscription to the stock of a railroad company in the hands of an innocent holder, that the railroad company was not organized within the time limited by its charter. *County of Ralls v. Douglass*, 106 U. S. 728, 26 L. Ed. 975.

Officer de facto.

249. (Mo. 1881.) County bonds issued by a de facto County Court and sealed with the seal of the court, and signed by the de facto president of the court, cannot be impeached in the hands of innocent holders by showing that the acting president was not de jure one of the justices of the court.

"In no State is it more authoritatively settled than Missouri that 'the acts of an officer de facto (although his title may be bad) are valid, so far as they concern the public or the rights of third persons who have an interest in the things done.' In *State v. Douglas*, 50 Mo. 593, 596, the Supreme Court of that State said: 'Without this rule, the business of the community could not be transacted. The public are necessarily compelled to do business with an officer who is exercising the duties and privileges of an office under color of right, and to say that his acts as to strangers should be void would be productive of irreparable mischief. It would cause a suspension of business till every officer's right de jure was established.' To the same effect is *Harbaugh v. Winsor*, 38 Mo. 327. This is conclusive. The question here is not whether Dimmick was de jure probate judge of Ralls county, but whether he was acting under color of right as a justice and president of the County Court." *County of Ralls v. Douglass*, 105 U. S. 728, 26 L. Ed. 975.

250. (Tenn. 1886.) There can be no officer de facto or de jure if there is no office to fill.

"But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law."

"There must be a legal office in existence, which is being improperly held, to give to the acts of such incumbent the validity of an officer de facto."

An extensive discussion and a large number of cases examined and commented upon. *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. Ed. 178.

De facto county; legislative recognition.

251. (Kan. 1890.) "It is universally affirmed that when a legislature has full power to create corporations, its act recognizing as valid a de facto corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization, and makes a de jure out of what before was only a de facto corporation." *Held*, that the validity of the organization of a county could not be col-

laterally challenged in an action on its bonds.

"And this is no mere technical ruling. It rests on foundations of substantial justice. It is true that the present inhabitants have been wronged by the fraudulent acts of these conspirators in 1873-74, and it is a hardship for them to be bound for debts they did not contract, and from which they received no benefit; but, on the other hand, it would be an equal hardship to the plaintiff to lose the money he has invested in securities placed on the market, whose validity was attested to the fullest extent by both the executive and legislative departments of the State. When both of those departments give notice to the world that a county within the territorial limits of the State has been duly organized and exists with full power of contracting, can it be that a purchaser cannot in open market safely purchase the securities of that county? Does the duty rest on him to traverse the limits of the county and make personal inspection of the number of the inhabitants? If any wrong has been done to the county through the want of attention on the part of the State authorities, equity would suggest that the State should bear the burden, and not cast it upon an innocent party residing far from the State and acting in reliance upon what it has done." *Comanche County v. Lewis*, 133 U. S. 198, 10 Sup. Ct. Rep. 286, 33 L. Ed. 604.

Corporation de facto.

252. (N. Y. 1895.) It is familiar law that one who contracts with a corporation as such cannot afterward avoid the obligations assumed by such contract on the ground that the supposed corporation was not one de jure. *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. Rep. 954, 39 L. Ed. 996.

De facto county; why acts of, held valid; powers of, and rules of law governing, discussed.

253. (Mich. 1893.) "Assuming that, under the doctrine of *People v. Maynard*, above referred to, the courts of the United States would be bound to hold that such organization was unlawful and void in its inception, it does not, in our opinion, follow that if the county, assuming it to be valid, went on as such, acquired the capacity to be a county, and exercised for years,

with the acquiescence of the State government, the functions and privileges of a county, its status and the validity of its acts are to be tested by such rules as would have been applicable in a direct and prompt challenge by the State when those powers and privileges were assumed. In the latter case the public interests are best subserved by speedy reformation, and no private interest is harmed. In the former, the public interests have been adjusted to the actual condition of things, and private interests have become settled upon the foundations which local authority has laid, with the consent of the State, whose business it was to interfere and prevent the mischief, if any such were feared. It is a matter peculiarly within the province and duty of the State to watch over and prevent the development of political growths which are likely to be prejudicial to the public interests. When it does not interfere private individuals are justified in assuming that there is nothing obnoxious in the organization, and that they may treat with it in the character it has assumed. In the case of a county, after it has gone on for years as such, taxes have been levied and collected under its authority; deeds and mortgages have been registered in its records, and titles have been gained or lost by such registration; the estates of deceased persons have been settled and distributed by its courts of probate; the rights of parties have been adjudicated and remedies awarded, by the Circuit Court, in session at its county seat, and accused persons have been tried, convicted, and sentenced to imprisonment by that court. We do not know that, in this instance, all these particular incidents have happened, but it is reasonable to suppose all may have occurred, and many others of kindred character. May the foundation on which all these things rest for their security or authority be repudiated and denied by the municipality which assumed the character, has been allowed to act in it, and, agreeably to the law governing it in that character, has pledged its faith to repay what it has received and applied to its advantage, and thus disappoint the expectations of those who have trusted in its representations?"

After noticing a number of authorities, the court proceeded: "But it is needless to multiply authorities. They are substantially, if not altogether, agreed upon the proposition that when a municipal body has assumed, under color of authority, and exercised for any considerable period of time, with the consent of the State, the powers of a public corporation of a kind recognized by the organic law, neither the corporation nor any private party can, in private litigation, question the legality of its existence."

"But counsel for the defendant lays principal stress upon the doctrine that there cannot be a county *de facto* where there can be none *de jure*; and it is argued that, because the law of 1871 was void when enacted, and gave no authority for organization, there was no law under which Presque Isle county could become *de jure* a county, and therefore it could not become *de facto* such. The general proposition is no doubt correct as a statement of a doctrine of law. But we do not think that proposition, as applied to the case before us, is sound. We doubt whether the premise of the proposition founded on it is true. We have already given some reasons for thinking it is not. But we also think the premise is insufficient. The supreme law of the State recognizes counties as political bodies corporate. Their existence is not only permitted, but is essential to the government which is organized. Their corporate character is not given by the legislature. That body, if it deems the organization consistent with public policy, prescribes a method of organization in form. This law, whether operative or not, signified the approval of the legislature of the formation of the new county, and in so far was in execution of its authority under the Constitution; and we apprehend the rule to be that an unconstitutional and void law may yet be color of authority to support, as against anybody but the State, a public or private corporation *de facto*, where such corporation is of a kind which is recognized by, and its existence is consistent with, the paramount law, and the general system of law in the State." *Ashley v. Board of Supervisors of Presque Isle County*, 8 C. C. A. 455, 60 Fed. 55.

Board of education; de facto corporation; acts of, binding as against bona fide purchaser of its bonds.

254 (S. Dak. 1894.) Whether the election of the board of education of the city of Huron was in compliance with law or not is immaterial. The members elected immediately took charge of the schools and school property, and continued to discharge all the functions of the board of education, and when the bonds in controversy were issued the said board was, in any event, a de facto corporation, exercising under the law all the powers and functions granted to corporations legally organized, and, as against bona fide purchasers of the bonds, its acts as a de facto board of education, if within the powers granted to a board legally organized under the law, are binding on the defendant corporation."

"When a municipal body has assumed, under color of authority, and exercised, for any considerable period of time, with the consent of the State, the powers of a public corporation, of a kind recognized by the organic law, neither the corporation nor any private party can, in private litigation, question the legality of its existence. *Ashley v. Board*, 8 C. C. A. 344, 60 Fed. 55, 63; *County of Ralls v. Douglas*, 105 U. S. 728, 730, 26 L. Ed. 957; *Coler v. School Township* (N. Dak.), 55 N. W. 587; *Clement v. Everest*, 29 Mich. 19; *Burt v. Railroad Co.*, 31 Minn. 472, 18 N. W. 285, 289; *State v. Carr*, 5 N. H. 367; *People v. Maynard*, 15 Mich. 463; *Fractional School Dist. No. 1 v. Joint Board of School Inspectors*, 27 Mich. 3." *National Life Ins. Co. of Montpelier v. Board of Education of City of Huron*, 10 C. C. A. 637, 62 Fed. 778.

De facto county; when acts of officers of, binding on; principle stated; de facto corporation under unconstitutional law.

255. (Kan. 1898.) A county, though not legally organized, if it acts in the corporate capacity of a legally organized county, with the acquiescence of the State authorities and of the people of such county, is a quasi-municipal body, and is bound by its contracts the same as though it had been legally organized.

"And may this county retain the benefits and improvements it has thus

obtained, and yet deprive those who furnished them, or those who subsequently purchased its warrants, of all right to a return of the money which they invested in them? We think not. In our opinion, there is an established rule of jurisprudence which prevents results so unjust and deplorable. That principle is that the acts of ordinary municipal bodies into which the people have organized themselves under color of law depend far more upon general acquiescence than upon the legality of their action or the existence of every condition precedent prescribed by the statutes under which they organize and act. It is that general acquiescence by the inhabitants of the political subdivision so organized, and by the departments and officers of the State having official relations with it, gives to the acts and contracts of a municipal or quasi-municipal corporation de facto, all the force and validity of the acts of a corporation de jure. The interests of the public which depend upon such municipalities, the rights and the relations of private citizens which become vested and fixed in reliance upon their existence, the intolerable injustice and confusion which must result from an ex post facto avoidance of their acts, commend the justice, and demand the enforcement of the rule, that 'when a municipal body has assumed, under color of authority, and exercised, for any considerable period of time, with the consent of the State, the powers of a public corporation, of a kind recognized by the organic law, neither the corporation nor any private party can, in private litigation, question the legality of its existence.'" Citing a number of cases.

It was urged that there could be no de facto corporation under an unconstitutional law.

"We are unable to yield our assent to the broad proposition that there can be no de facto corporation under an unconstitutional law. Such a law passes the scrutiny and receives the approval of the attorney-general, of the lawyers who compose the judiciary committee of the State legislative bodies, of the legislature, and of the governor, before it reaches the statute book. When it is spread upon that book, it comes to the people of a State with the presumption of validity.

Courts declare its invalidity with hesitation and after long deliberation and much consideration, even when its violation of the organic law is clear, and never when it is doubtful. Until the judiciary has declared it void, men act and contract, and they ought to act and contract on the presumption that it is valid; and where, before such a declaration is made, their acts and contracts have affected public interests or private rights, they must be treated as valid and lawful. The acts of a de facto corporation or officer under an unconstitutional law before its invalidity is challenged in or declared by the judicial department of the government, cannot be avoided, as against the interests of the public or of third parties who have acted or invested in good faith in reliance upon their validity, by any *ex post facto* declaration or decision that the law under which they acted was void. This proposition is not without the support of eminent authority. Indeed, we believe it is founded in reason, and sustained by the general current of the decisions of the courts that have considered it."

A number of cases on this proposition are reviewed in the opinion. *Speer v. Board of County Commissioners of Kearney County, Kansas*, 32 C. C. A. 101, 88 Fed. 749.

Illegal organization of precinct by county officers; no defense to bonds issued for such precinct; bona fide holder.

256. (Nebr. 1900.) To a defense interposed by a county in Nebraska, not under township organization, in an action against it on bonds issued by its board of county commissioners on behalf of a precinct of the county, that the precinct had not been legally organized by the board of commissioners, the court say:

"There is another reason why the defense which we have been considering cannot be sustained. It is that the general acquiescence by the inhabitants of a political subdivision organized under color of law and by the

departments and officers of the State and county having official relations with it, gives to the acts and contracts of those officers on its behalf as a subdivision de facto, all the force and validity of their acts in its behalf as a subdivision de jure. The acts of ordinary municipal bodies organized under color of law depend far more upon acquiescence than upon the legality of their action or the existence of every condition precedent prescribed by the statutes under which they organize and act. The interests of the public which depend upon such municipalities and their various subdivisions, the rights and the relations of private citizens which become fixed in reliance upon their existence, the injustice and confusion which must result from an *ex post facto* avoidance of their acts, commend the justice and demand the enforcement of the rule that, when a municipal body or a political subdivision of a State or county has, or its officers have, assumed, under color of authority, and have exercised for a considerable period of time, with the consent of the State and its citizens, powers of a kind recognized by the organic law, neither the corporation, subdivision, or any private party can, in private litigation, question the legality of the existence of the corporation or subdivision."

"It may be that if the State or the county, or any taxpayer of this precinct, had challenged its existence, or the right of the county or its officers to issue these bonds, by a writ of *quo warranto*, or by an application for an injunction, before public interests were affected or private rights had vested under them, the issue of the bonds might have been stayed. The assessor, the justices of the peace, and the constables might have been restrained from exercising their functions, and the board of county commissioners might have been compelled to change the boundaries of the precinct. But no such action was taken." *Clapp v. Otoe County, Nebraska*, 45 C. C. A. 579, 104 Fed. 473.

Official acts of de facto officers; bonds authorized by councilmen and signed by mayor after their successors had qualified, but before they had entered upon their official duties.

257. (Cal. 1902.) "Another defense is that Jeter, who signed the bonds, was not the rightful mayor of Santa Cruz. The facts bearing upon this point have been heretofore stated and need not be repeated. The Circuit Court said:

It is claimed by the defendant that, as it is not shown that the bonds sued on were signed by Wm. T. Jeter before the qualification of his successor in the office of mayor, the plaintiff has failed to prove that the bonds were signed by an officer authorized to do so, and they must therefore be held void, even in the hands of bona fide purchasers, under the rule declared in *Coler v. Claburne*, 131 U. S. 162. That case is not authority for the proposition that the action of a de facto officer in signing bonds would not be as binding upon the municipality for which he assumes to act as that of an officer de jure; and it seems clear to me that if Jeter was the de facto mayor when he signed the bonds sued on, then such signature by him was a compliance with the ordinance requiring them to be signed by the mayor, and so, also, if he was de facto mayor, and those assuming to act as the common council of the defendant were de facto members of the common council at the time when he and they assumed as mayor and common council to accept the proposition of Coffin & Stanton in relation to the bonds, and directed their delivery to that firm, then such acts upon their part are to be treated, so far as concerns the public and third persons having an interest in what was done by them, as the acts of the de jure mayor and common council of the city. The rule that the acts of a de facto officer are valid as to the public and third persons, is firmly established, although it is sometimes difficult to determine whether the evidence is such as to

warrant a finding that a particular act or acts, the legality of which may be in issue in a given case, were those of a de facto officer. The contention of the defendant is that Jeter was not the de facto mayor at the time of the signing and delivery of the bonds, nor were the old members of the common council, who continued to act as such after the qualification of their successors, and until after the bonds were delivered to Coffin & Stanton, de facto members of the common council of defendant, after the qualification of their successors. Whether one was or was not a de facto officer at the time when he assumed to perform duties belonging to a public office, is a mixed question of law and of fact. *State, ex rel., Van Arminge v. Taylor*, 108 N. C. 196; same case 12 L. R. A. 202; *United States v. Alexander*, 46 Fed. Rep. 728. And in passing upon the question presented by defendant's contention upon this point, it is necessary to first consider what facts are sufficient to constitute a de facto officer. A de facto officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is found thus openly in the occupation of a public office, and discharging its duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title, but may safely act upon the assumption that he is a rightful officer. Thus it is said in *Petersilea v. Stone*, 119 Mass. 468: "Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him

as such, should not be subjected to the danger of having his acts collaterally called in question."

"We are entirely satisfied with the treatment of this question by the

Circuit Court, and deem it unnecessary to make any additional observations." *Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. Rep. 327, — L. Ed. —.

CHAPTER V.

MUNICIPAL AND OTHER PUBLIC BOARDS AND OFFICERS; THEIR ACTS, PROCEEDINGS, AND RECORDS RELATING TO THE ISSUANCE OF BONDS.

- A. Municipal and other public officers have such powers as legislature may confer, and must proceed and act in manner prescribed by the legislature.
- B. Proceedings and records of proceedings of municipal officers and boards; purchasers of municipal bonds charged with notice of, when.
- C. Other public records and data of which purchasers of municipal bonds must take notice.

The corporate powers of municipal bodies are necessarily exercised by the agency of officers, boards, or other tribunals selected in the manner provided by law and having such duties and authority as the legislature may direct and provide. The legislature may also prescribe the manner in which, the conditions upon which, and the forms of procedure by which, all public officers, boards, or tribunals shall perform their acts and duties, and may also prescribe the records or other memorials by which the proceedings, acts, and determinations of such officials, boards, or tribunals, or other public matters, shall be evidenced, as well as the legal effect of such records as evidence or notice of what they are required to contain.

For instance, when the statute requires official acts or proceedings to be evidenced by the adoption, recording, and publication of a formal ordinance, the adoption of such ordinance in the manner prescribed, and its publication in the manner provided, and for the period required, are generally held to be necessary to the validity of the action or proceeding, especially when the direction is accompanied with a provision to the effect that such action or proceeding shall be void, or such ordinance shall not take effect or be in force, unless so adopted or until so published or recorded; and when the adoption of such formal ordinance is required, a mere resolution or other informal order will generally not suffice.

It may be stated as a general rule that in the absence of special provision requiring councils, boards, or other officers to proceed by ordinance to be adopted and published with particular formalities, a resolution or other informal order embodying and evidencing the official proceeding or action will suffice; but when a resolution or other informal order is permissible, if the statute requires its adoption in a particular manner, or its publication, as a condition to its taking effect, the adoption and publication as required are as essential as in case of an ordinance.

Public records, permanent or periodical, are sometimes required to be made and kept, relating to the political status and financial condition of the municipalities of the State, or other matters of public nature affecting their powers.

To what extent purchasers of municipal securities are charged with notice of the contents of any such public records required by law to be made and kept showing the proceedings, findings, and orders of public boards and officers relating to the issuance of bonds or other municipal contracts, or of other records relating to the fiscal or other affairs of municipal bodies, and to what extent the failure of the proper officers to comply with such statutory requirements will affect or prejudice purchasers of such securities, cannot be definitely expressed in any brief general statement.

There are apparently some conflict or differences in the decisions of the courts concerning these matters, but such seeming differences are probably owing largely to the varying provisions of the laws of the different States. The courts in construing any such statutory provision aim to give effect to the intention of the legislature; and, when it appears that certain public records or entries are intended to be the sole evidence of official acts or proceedings, or of the facts which they are required to embody, such intention will be respected by the courts, and the purchaser of bonds will be held to be charged with notice of what is disclosed by such records, and may not rely upon representations or certificates of officers relating to such matters; but on the other hand, when it appears that the boards or officers authorized to issue the bonds or to direct their issuance are also charged with the duty of determining the existence of the facts and conditions precedent, justifying the issuance of the bonds, unless some record or records are designated, expressly or by reasonable implication, as the only proper evidence of such facts, conditions, or determination, a *bona fide* purchaser of the bonds may rely upon

such findings and representations made by such boards or officers, by recitals in the bonds or otherwise in the exercise of their official powers, and will not be chargeable with notice of the contents of records disclosing facts different from such findings and representations, and the municipality as against such bona fide purchaser will be bound by such representations and estopped from denying their truth.

In the construction of any such statutory requirements or provisions, when judicial interpretation is necessary to ascertain the intent and purpose of the legislature in their enactment, or the legal effect of such records as evidence or notice, or the consequences of noncompliance with such legal requirements, the Federal courts, in any such cases before them, will generally adopt and follow the rules of decisions of the court of last resort of the State relating thereto.

Besides the cases digested and cited in this chapter those in Part C, Chapter IV, and Parts D and E, Chapter VII, will be found to materially aid in illustrating the rules and matters herein suggested.

A. Municipal and Other Public Officers Have Such Powers as Legislature May Confer, and Must Proceed and Act in Manner Prescribed by the Legislature.

Publication and record of ordinance, when not required.

258. (Pa. 1860.) A requirement in the charter of the city of Allegheny, that ordinances authorized by it should be published and recorded as therein provided, could have no application to an ordinance of the city passed for a special purpose to carry out an act of the legislature outside of the charter. *Henry Amey v. The Mayor, Aldermen, and Citizens of Allegheny City*, 24 How. 364, 16 L. Ed. 614.

Legislature may designate officers to perform corporate acts.

259. (Wis. 1865.) "The commissioners or board of supervisors of a county, in the exercise of their general powers as such, have no authority to subscribe stock to railroads, and bind the people of the county to pay bonds issued for that purpose, without special authority conferred upon them by the legislature. But when special authority is given to the people of a county to do these acts, and bind themselves by the issue of such bonds, the legislature may

properly direct the mode in which it shall be effected. The persons especially appointed to act as agents for the people have a ministerial duty to perform in issuing the bonds, after the people, at an election held for the purpose, have assented that they shall be bound. Such persons, in performance of their special duty, are in no proper sense 'county officers.' They do not exercise any of the political functions of county officers, such as levying taxes, etc. They do not exercise continuously and as a part of the regular and permanent administration of the government, any important public powers, trusts, or duties. An officer of the county is one by whom the county performs its usual political functions—its functions of government. Any other persons appointed by the legislature and the people of the county would be as competent to execute the bonds of the corporation as the supervisors. They are the lawful agents of the people for this special purpose, and though nominated by the legislature, they cannot act without

the assent of the citizens of the county, ascertained in the manner directed by law; and, having so acted, the county cannot now repudiate their acts." *Sheboygan County v. Parker*, 3 Wall. 93, 18 L. Ed. 33.

Acts of county judge beyond limits of county.

260. (Iowa, 1872.) "It was competent for the county judge to visit New York, for purposes connected with the proper disposal of the bonds. A statute of the State authorized him to procure a seal, and prescribe certain regulations to which all such seals should conform. While there, he might well take up bonds which had been previously issued, but not put on the market, and give others in their place, affixing to them a seal there procured for that purpose." "All the judge did was purely ministerial in its character, and we see no sufficient reason for holding that to this extent he did not bring with him his official character and exercise his official authority. He did not for the time being wholly abdicate his office. Certain powers with which it was clothed fell into abeyance, and continued in that state until his absence ceased. The authority to do all that he did in New York, touching the bonds, we hold not to have been in this category." *Lynde v. The County*, 16 Wall. 6, 21 L. Ed. 272.

Canvass of votes by authorized officers conclusive.

261. (Kan. 1877.) "The bonds were executed by the township trustee, and attested by the township clerk. These were the officers designated by the statute to execute such bonds. The recitals were that the bonds were made and issued in pursuance of the provisions of the act of the legislature of March 2, 1872. But whether the recitals were an estoppel against showing what the defendant proposed to show, or whether they were not, is quite immaterial in this case. The proof offered was, that, in the records of the county commissioners of the county of which Rock Creek township is a part, it appeared the board had canvassed the vote at the election held to determine whether the township should issue the bonds, and had determined the result to be, for the issue,

fifty-two votes, against the issue, fifty-one votes, making one hundred and three votes in all cast; but that in fact no canvass was made and that only one hundred and two votes were cast, fifty-one of which only were in favor of issuing the bonds, and that one person who voted in favor was not a qualified elector." *Township of Rock Creek v. Strong*, 96 U. S. 271, 24 L. Ed. 815.

Legislative; power of appointment of municipal officers.

262. (Ala. 1880.) "It is not necessary to constitute an agency of a political subdivision of a State that its officials should be elected by its people or be appointed with their assent. It is enough to give them that character that, however appointed, they are authorized by law to act for the county, district, or other political subdivision." *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 283.

Corporate authorities of township, who are?

263. (Ill. 1880.) "The stock was subscribed and the bonds were issued in this case by the supervisor and clerk, and it is insisted that neither the act of the legislature nor the Constitution of the State allowed this to be done; that it could only be done by the corporate authorities, which included the legal voters as well as the supervisor and clerk." Held, that the supervisor and clerk were the proper corporate authorities of the township. *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526.

264. (Tenn. 1886.) To give validity to the acts of County Courts or other tribunals or boards, the presence and participation of a legal quorum is necessary. *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. Ed. 178.

Resolution or ordinance; discretion of council.

265. (Kan. 1893.) The general rule is that where the charter commits the decision of a matter to the council and is silent as to the mode, the decision may be by a resolution and need not necessarily be by ordinance. *Atchison Board of Education v. De Kay*, 148 U. S. 591, 13 Sup. Ct. Rep. 706, 37 L. Ed. 573.

Power to issue bonds should be exercised by ordinance.

266. (Colo. 1893.) Under the laws of Colorado, the powers conferred upon municipal corporations to issue bonds should be exercised by an ordinance containing the usual and necessary provisions to guide, control, and bind the corporation and its officers and the public.

Failure to record, authenticate, and publish ordinance; no estoppel; recitals do not aid.

An ordinance of the town of Grenada, Colorado, providing for the issuance of refunding bonds of the town was not "recorded in a book kept for that purpose," and was not "authenticated by the signature of the presiding officer of the * * * board of trustees and the clerk," and "was not published" as required by law. In an action on bonds issued under such ordinance, held, that the ordinance never went into effect and conferred no authority on the officers of the town to do any act under it, and that the bonds were void, and it was as though no ordinance had been passed. Held, also, that a recital in such bonds that they were issued under the ordinance of the town does not estop the town from showing that the ordinance was not published.

"If the recital in this case had stated, in terms, that the ordinance had been duly published, it would not have estopped the town, because neither the mayor nor the clerk, nor both together, are invested with the authority to determine that question, and anything they might say or certify to on the subject, save as witnesses in court, would not be evidence anywhere, or bind anyone." *National Bank of Commerce v. Town of Grenada*, 4 C. C. A. 212, 54 Fed. 100, 10 U. S. App. 692.

Resolution or ordinance.

267. (Kan. 1894.) "The law is well settled that a municipal corporation may declare its will as to matters within the scope of its corporate powers, either by a resolution or an ordinance, unless its charter requires it to act by ordinance; and generally it is of little significance whether a legislative measure is couched in the language of an ordinance or of a resolution, where it is enacted with the

same formalities which usually attend the adoption of ordinances. If the action taken by a municipality amounts to prescribing a permanent rule of conduct, which is to be thereafter observed by the inhabitants of the municipality, or by its officers in the transaction of the corporate business, then, no doubt, the rule prescribed may be more properly expressed in the form of an ordinance; but it is eminently proper to act by resolution, if the action taken is merely declaratory of the will of the corporation in a given matter, and is in the nature of a ministerial act."

Bonds issued in pursuance of a resolution should not be declared invalid "unless the charter of the city contains unmistakable evidence that the council could not lawfully act otherwise than by an ordinance." *National Bank of Commerce v. Town of Grenada*, 4 C. C. A. 212, 54 Fed. 100, 10 U. S. App. 692, distinguished. *City of Alma v. Guaranty Savings Bank*, 8 C. C. A. 564, 60 Fed. 203.

Necessity for ordinance or resolution passed by a council.

268. (Kan. 1895.) The statute of March 8, 1879, of Kansas, authorizing the issuing by cities, counties, and etc., of refunding bonds, "Conferred on the defendant city a power which could only be exercised by it by means of an ordinance or resolution passed by its council and approved by its mayor; that it was the duty of the bond purchaser to ascertain by proper inquiry whether such an ordinance or resolution had been enacted; and that it was beyond the power of the mayor and city clerk to issue refunding bonds without the sanction of the council, or to bind the city by estoppel to pay refunding bonds not authorized by the council, by a recital inserted therein that they had been duly and legally issued."

Ordinance record as evidence on issue of whether an ordinance had been adopted.

The book of record of ordinances of a city is competent evidence as tending to prove an allegation that no ordinance had been passed by the council authorizing the issue of the bonds in suit, notwithstanding the plaintiff was an innocent holder of the bonds which contained recitals importing

compliance with law. *Hinkley v. City of Arkansas City*, 16 C. C. A. 359, 69 Fed. 768.

Council of city cannot delegate authority.

269. (Tex. 1896.) When the charter of a city commits to the city council exclusively the control of the city's finances, authority cannot be delegated by the council to the mayor to sell the bonds of the city in his discretion as to price, and thereby bind the city. *Blair, et al., v. City of Waco*, 75 Fed. 800, 21 C. C. A. 517.

Municipal ordinance; legal passage may be presumed.

269a. (Colo. 1905.) "It is contended by counsel for plaintiff in error that the ordinance was invalid for the reason that it was not passed at a legal meeting of the board of trustees of the town, and also because it was not published as required by the Colorado statute. The records of the board of trustees showed that at an adjourned regular meeting of that body, held on June 3, 1891, at which was present a legal quorum, a further adjournment to June 5th was ordered, and on the latter day, no quorum being present, the meeting was adjourned to June 8th, at which time there was a quorum, and the ordinance was passed by the requisite number of votes. The particular contention is that, because of the absence of a quorum on June 5th, the meeting died as matter of law, there could have been no legal adjournment thereof, and therefore the meeting at which the ordinance was adopted was wholly unauthorized. But we cannot assent to this conclusion. The mayor and four of the six trustees were present and acted in the passage of the ordinance. They assembled at a time when a legal session was possible and transacted other business of importance. The minutes of the meeting were duly entered and still remain upon the public records of the town. It is not essential that every step leading up to the assem-

blage of a city council or connected with proceedings which are within the general powers conferred upon it be shown with that degree of strictness which is required in tracing title to realty back to its fountain head. There is a presumption, which is in accord with a wise public policy, in favor of the regular and rightful performance of official duty by public officers. 'Omnia prae sumuntur rite et solemniter esse acta donec probetur in contrarium.' And when, as in this case, many years after the passage of an ordinance out of which substantial rights have grown, it is assailed upon such a ground as that here presented, it may be assumed, if necessary, that the meeting was a special one, and that the two absent trustees were duly advised thereof and of the matters to be then considered and passed upon."

A number of authorities cited in the opinion in support of this ruling.

Presumption of legal publication of municipal ordinance.

"A statute of Colorado provided that, to be effective, the ordinances of a town must be published in some newspaper published within its corporate limits, or, if there be none, in one of general circulation therein, or, if there be neither, the publication shall be made by posting copies of the ordinance in three public places in the town, to be designated by the board of trustees. The evidence showed that since its incorporation there was no newspaper in which publication could legally be made. There were then introduced in evidence copies of the town records covering the period from the incorporation of the town until and including July 1, 1891, which was the date of the bonds from which the coupons in suit were detached, and they showed no action of the board of trustees designating the places and no posting of the ordinance. There was no evidence, however, that the ordinance had not been posted at places designated after the date of the bonds,

It is claimed in this connection that a designation of the public places by the board of trustees was essential; that, in the absence thereof, there could have been no lawful posting; and, that, as the records introduced in evidence covered the period down to the date of the bonds, no inference or presumption could be indulged in that there was a designation of places and a posting after that time. The statute referred to also required that all ordinances, after their passage, be re-

corded in a book styled 'Book of Ordinances,' which should be considered in all the courts of the state as prima facie evidence that the ordinances appearing therein had been published as provided by law. The ordinance in controversy was duly recorded in the book of ordinances, and it therefore devolved upon the town to overcome that proof of the publication by affirmative evidence." *Town of Fletcher v. Hickman*, 136 Fed. 568, 69 C. C. A. 350.

B. Proceedings and Records of Proceedings of Municipal Officers and Boards; Purchasers of Municipal Bonds Charged with Notice of, when.

Imperfect township records, parol evidence to supply missing parts.

270. (Mich. 1890.) "Two books are produced, one purporting to be the journal of the township board, and the other a record of the proceedings of the commissioners of highways. The journal of the township board is evidently a defective record, and fails to show all the proceedings of the township board, and the minutes of certain of the township meetings. The record of the highway commissioner is made up under the supervision of the township clerk. In this book the clerk, who became clerk in September, 1871, certified that the records preceding his signature and sworn certificate were carefully copied from papers and books on file in the office of the township clerk. Part of these records are, on their face, minutes of the proceedings of the township, board and of township meetings. It was a palpable mistake to include them in the highway commissioner's records, but, as the clerk kept both records, it is easy to understand how, in the loose methods of keeping the books, the error occurred. In the absence of the originals, we think these sworn copies, authenticated by the clerk in whose custody the originals should have been, and produced by the township whose records they purport to be, are at

least prima facie evidence of the facts they record. 1 Dill Mun. Corp., § 304, and cases cited. They show on their face their incompleteness, and this is moreover directly testified to by Fred. Denny Lark, who was, during the year 1871, at one time, town clerk, and at another, supervisor. In this condition of the record, it is permissible to supply the missing parts by parol evidence. It was the duty of the township clerk to keep the record of the proceedings of the township board, and also of the township meetings (How. Ann. Stat., §§ 739, 740, 748); but the law does not anywhere make the recording of the proceedings a condition precedent to their validity. It is well settled that, under such a statute, creditors of a corporation, private, municipal, or quasi-municipal, cannot be defeated, because of the neglect of their debtor's clerk, properly to record the evidence of the orders and resolutions constituting the contract on the faith of which they have rendered service or advanced money to the corporation. *Bank v. Danbridge*, 12 Wheat. 64, 6 L. Ed. 552; *Bridgford v. City of Tuscumbia* (C. C.) 16 Fed. 910; *School Dist. v. Clark*, 90 Mich. 437, 51 N. W. 529; *Taymouth Tp. v. Koehler*, 35 Mich. 22; 1 Dill. Mun. Corp., § 300.

Failure to pass resolution.

The failure of a township in Michigan to pass a resolution, directing the issue of township bonds, held not to renders the bonds invalid, when it appears that they were issued by the direction of the board. *Rondot v. Rogers Tp.*, 39 C. C. A. 462, 99 Fed. 202.

Certified transcript of records of proceeds.

271. (Ind. 1860.) "Duly certified copies of the record of the proceedings were exhibited to the plaintiffs at the time they received the bonds, showing to a demonstration that further examination upon the subject would have been useless; for, whether we look to the bonds or the recorded proceedings, there is nothing to indicate any irregularity, or even to create a suspicion that the bonds had not been issued pursuant to a lawful authority; and we hold that the company and their assigns, under the circumstances of this case, had a right to assume that they imported verity." *Bissell v. City of Jeffersonville*, 24 How. 287, 16 L. Ed. 664.

Recital of issuance by virtue of an ordinance.

272. (Ind. 1863.) "Another objection taken is, that the proviso requiring a petition of two-thirds of the citizens, who were freeholders of the city, was not complied with. As we have seen, the bonds signed by the mayor and clerk of the city recite on the face of them that they were issued by virtue of an ordinance of the common council of the city, passed September 2, 1832. This concludes the city as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds, as has been repeatedly held by this court." *Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538.

Validity of bonds not affected by irregularity in ordinance.

273. (Iowa, 1863.) It was urged as a defense to bonds issued by the city of Muscatine, that the ordinance on which the vote for a loan was taken was void, because it submitted three distinct propositions in one, and in such a manner as to cut off an effective opposition from all voters who were not against the whole of the propositions.

"The record shows that all the votes cast, except five, were in favor of the loan. The city and citizens adopted and acted upon the ordinance as valid and sufficient. The citizens voted and the city authorities issued the bonds. No one interposed to prevent their issue. It is not questioned that all the parties acted in good faith, and the city cannot now be heard to object to the regularity of its own proceedings. A party taking the bonds was bound to look to the legal authority under which the public agents acted. If that were sufficiently comprehensive, he had a right to presume that those empowered to act and acting under it had complied with its requirements." *Meyer v. City of Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *Comrs. of Marion County v. Clark*, 94 U. S. 278 (284), 24 L. Ed. 59; *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79; affirmed in *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350.

Recital of issuance, "in pursuance of an ordinance."

274. (Ill. 1881.) Bonds issued by the city of Ottawa recited that they were issued to borrow money in pursuance of an ordinance, entitled "An ordinance to provide for a loan for municipal purposes." Held, that such recitals relieved the purchaser from any duty of noticing the provisions of the ordinances whose titles were recited in the bonds, and that the city was estopped, as against a bona fide holder for value, to say that the bonds not issued for legitimate or

proper corporate purposes. *Ottawa v. National Bank*, 105 U. S. 342, 26 L. Ed. 204.

& *Loan Association v. Perry County*, 156 U. S. 692, 15 Sup. Ct. Rep. 547, 39 L. Ed. 585.

Finding of record, by county board, of amount of county debt.

275. (Nebr. 1884.) "But if it be conceded that a purchaser of the bonds was required to inspect the records of the county to ascertain the amount of its indebtedness, and whether there had been an overissue of bonds, it appears from the findings of fact that the records of the commissioners contained an estimate of the indebtedness of the county made by them for the express purpose of fixing the amount of bonds to be issued, and in pursuance of which they were issued, which showed that there was no overissue. This was a decision by the very officers whose duty it was, under the law, to fix the amount of bonds which could be lawfully issued. A purchaser of bonds was not required to make further inquiry, and if the finding of the commissioners was untrue, he could not be affected by its falsity. See cases above cited; also *Lynde v. The County*, 16 Wall. 6; *Commissioners v. January*, 94 U. S. 202; *County of Warren v. Marcy*, 97 id. 96; *Commissioners v. Bolles*, 94 id. 104; *Pana v. Bowler*, 107 id. 529." *Sherman County v. Simons*, 109 U. S. 735, 3 Sup. Ct. Rep. 502, 27 L. Ed. 1093.

Records as evidence of compliance with conditions; estoppel.

276. (Ill. 1895.) One issue of bonds involved in this action was held valid in the hands of a bona fide purchaser, notwithstanding noncompliance with conditions contained in the proposition submitted to the voters, and notwithstanding the absence of recitals in the bonds, importing compliance with such conditions; the decision as to such bonds being that the county was estopped from denying their validity by the findings and records of the County Court. *Citizens' Savings*

Purchasers not bound by terms of ordinance recited in bonds, when; recitals in bonds may estop city.

277. (Ind. 1896.) The charter of the city of Evansville provided that, "No stock shall be subscribed or taken by the common council in such company, unless it be on the petition of two-thirds of the residents of said city, who are freeholders of the city, distinctly setting forth the company in which stock is to be taken, and the number and amount of shares to be subscribed."

In this case no such petition had been presented.

"Was a bona fide purchaser of bonds issued in payment of a subscription of stock—the power to subscribe being clearly given—bound to know that the conditions precedent to the exercise of the power were not performed? If the bonds had not contained any recitals importing a performance of such conditions before the power to subscribe was exercised, then it would have been open to the city to show, even as against a bona fide purchaser, that the bonds were issued in disregard of the statute, and therefore did not impose any legal obligation upon it. *Buchanan v. Litchfield*, 102 U. S. 278; *School Dist. v. Stone*, 106 id. 183, 187."

"But the bonds issued on account of subscription to the stock of the Evansville, Henderson & Nashville Railroad Company recite that the subscription was 'made in pursuance of an act of the legislature and ordinances of the city council, passed in pursuance thereof.' This imports not only compliance with the act of the legislature, but that the ordinances of the city council were in conformity with the statute. It is as if the city had declared, in terms, that all had been done that was required to be done, in order that the power given might be exercised." *Barnett v. Deni-*

son, 145 U. S. 135, distinguished. *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. Rep. 613. See also *Evansville v. Dennett*, 20 C. C. A. 142, 73 Fed. 966.

Recital in bonds as notice of order of county court.

278. (Ill. 1892.) A recital in county bonds, that they are issued "pursuant to an order of the County Court of said county * * * in part payment of a subscription to the capital stock of the Cairo & Vincennes Railroad Company," puts all persons dealing in the bonds, even purchasers for value in the open market, upon inquiry as to the terms of the order. *Post v. Pulaski County*, 1 C. C. A. 405, 49 Fed. 628, 9 U. S. App. 1.

Reference in bonds to ordinance.

279. (Mich. 1894.) Held in this case, that in view of the recitals contained in the bonds as to lawfulness of their issuance, a purchaser was not bound by what was disclosed in the ordinance authorizing their issuance and referred to in the bonds. *Risley v. Village of Howell*, 12 C. C. A. 218, 64 Fed. 453.

Record of finding of county commissioners; parol evidence to contradict.

280. (Tex. 1894.) The Constitution of Texas prohibits municipal corporations from creating indebtedness unless provision is made at the time for the levy and collection of a tax to pay such indebtedness. In this case, in an action on bonds issued by Runnels county, it was held to be erroneous to admit parol testimony as against a bona fide holder of bonds, to prove that an order providing for such tax was not in fact made until after the date at which it appeared of record.

"The plaintiff's proposition is that the records of the proceedings of a municipal corporation, when they are

required by law to be kept by such corporation, import absolute verity, and in a collateral proceeding, after the rights of third parties have accrued, cannot be impeached by parol." A number of authorities are cited to this proposition, among which is the case of *Bissell v. City of Jeffersonville*, 24 How. 288; *Dill. Mun. Corp.*, § 290. "The testimony in the record is to the effect that the plaintiff is a holder for value of the bonds in question and the coupons in suit, without notice of any infirmity in the title to them; and, as against an innocent holder of the coupons, we think it was error to admit the parol testimony which was admitted, and the judgment of the court must therefore be reversed; and it is so ordered." *Mathis v. Runnels County*, 13 C. C. A. 600, 66 Fed. 494.

281. (Kan. 1895.) It is the duty of a bond purchaser to ascertain by proper inquiry whether an ordinance or resolution had been enacted authorizing their issue. *Hinkley v. City of Arkansas City*, 16 C. C. A. 359, 69 Fed. 768.

Records disclosing illegality.

282. (Kan. 1895.) "But counsel for the plaintiff in error contends that the defendants in error were not bona fide purchasers. No claim is made that they had any actual notice that the bonds were not issued and used for the purpose shown by the recitals they contain. The contention is that the copy of the proposition of the sugar company to build a factory for \$15,000 in refunding bonds, and the copy of the agreement of the sugar company to do so (which contains a receipt for fifteen refunding bonds), which have been found in the same book in which the records of the meetings of the township board were recorded, charge all purchasers of these bonds with constructive notice that the records of the meetings of the

board and the recitals in the bonds were false, and that the bonds were issued for an unlawful purpose. This position is untenable. The recitals in the bonds themselves are fatal to it. They declare that the bonds were issued for a lawful purpose." *West Plains Township, Meade County, v. Sage, et al.*, 16 C. C. A. 553, 69 Fed. 943.

Recitals in bonds "in pursuance of a statute and an ordinance;" effect as notice of contents of ordinance.

283. (111. 1896.) *City of Evansville v. Dennett*, 161 U. S. 434, followed: "The only reason for saying that a reference to an ordinance puts a party upon inquiry into the contents thereof is because the reference conveys knowledge of the existence of the ordinance. But common councils, boards of commissioners, and like municipal bodies can act only by order, ordinance, or resolution, as every one is bound to know; and, when a municipal bond is offered upon the market, it needs no mention in a recital to give a proposed purchaser notice that the bond was issued in pursuance of an order, or resolution, or ordinance. The existence of the bond implies that much, and when there is a recital to the effect that the bond was issued in pursuance of a statute, the necessary import is that there was an ordinance, and a proper one, whether express mention is made of it or not. To say 'In pursuance of a statute and an ordinance' is equivalent to an express statement that the ordinance is in conformity with the statute, and the purchaser of a bond containing that recital is not bound in that particular to look for further information." *Wesson v. Saline County; Society for Savings v. Same*, 20 C. C. A. 227, 73 Fed. 917; *Ashman v. Pulaski County*, 20 C. C. A. 232, 73 Fed. 927.

Recitals in bonds of issuance, "in pursuance of an act of the legislature of the State of Indiana, and ordi-

nances of the city council of said city, passed in pursuance thereof;" effect of, as notice.

284. (Ind. 1896.) 1. The recitals in the series of bonds involved in this suit that they were issued "In pursuance of an act of the legislature of the State of Indiana, and ordinances of the city council of said city, passed in pursuance thereof," does not put a purchaser thereof upon inquiry as to the terms of an ordinance under which the bonds were issued.

2. The recitals in the series of bonds involved in this suit that they were issued "By virtue of a resolution of said city council, passed May 23, 1870," does not put a purchaser upon inquiry as to the terms of that resolution, or charge him with knowledge of its terms.

3. In view of such recitals, a purchaser is not put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of the city of Evansville, who are freeholders of the city, had been presented to the common council before that body had subscribed for stock in said railroad company.

4. Such recitals in the bonds, as against a bona fide purchaser for value of such bonds, estop the city of Evansville from asserting that such bonds were not issued for stock subscribed upon a petition of two-thirds of the residents of said city, who are freeholders of the city, distinctly setting forth the company in which such stock is to be taken, and the number and amount of shares to be subscribed.

5. In such a case, a purchaser of such bonds has a right to assume, from recitals in the bonds, that the prerequisites of both the valid and invalid act had been observed before the issuance of the bonds. *Evansville v. Dennett*, 20 C. C. A. 142, 73 Fed. 966.

Record of county board of determination of result of the election.

285. (Nebr. 1897.) By the Laws of 1879 (p. 364, § 30), provision is made for ascertaining and making a public

record of the result of the vote of the qualified electors of a county, where such a proposition has been submitted to vote, pursuant to law. It is enacted:

"If it appears that two-thirds of the votes cast are in favor of the proposition, and the requirements of law have been fully complied with, the same shall be entered at large by the county board upon the book containing the record of their proceedings."

"This vests in the county board the power of determining whether or not it appears that two-thirds of the votes cast are in favor of the proposition, and whether or not the requirements of the law have been fully complied with." Held, that such finding was conclusive against the county in favor of a bona fide holder of bonds. *Valley County v. McLean*, 25 C. C. A. 174, 79 Fed. 728.

Official record of canvass of votes; parol evidence to contradict.

286. (Miss. 1897.) The records of the mayor and aldermen of the city of Clarksdale contained minutes of the result of a canvass by the board of the votes cast at an election held on the proposition to issue the bonds in suit, and a finding that notice of the election had been given as the law required. Held, in an action on the bonds by a bona fide holder, that parol evidence was not admissible to prove that the required notice had not been given. *City of Clarksdale, Miss., v. Pacific Imp. Co.*, 26 C. C. A. 434, 81 Fed. 329.

Purchasers not charged with notice, when.

287. (Kan. 1897.) "In view of the broad recitals which the bonds in controversy contain, the result is, we think, that neither Sage or Williams, nor the plaintiff, for that matter, were charged with the duty of examining the proceedings of the board of county commissioners of Kiowa county which culminated in the execution

and delivery of the bonds, and that neither Sage nor Williams is chargeable with knowledge that the county voted, in the aggregate, to both companies, more bonds than it was entitled to issue, because an examination of the proceedings of the board would have disclosed that fact. The bonds which Sage is shown to have purchased advised him, by their recitals, that the issue amounted to \$60,000—a sum not in excess of the amount authorized by law—while the bonds purchased by Williams advised him that the issue amounted to \$120,000, which was not an excessive issue, when tested by the assessment for the year 1887, of which assessment, it may be conceded, both purchasers were bound to take notice. *Chaffee County v. Potter*, 142 U. S. 355, 12 Sup. Ct. Rep. 216. So far as this record discloses, therefore, Sage and Williams were both bona fide holders of the bonds which they respectively bought, and both were entitled to recover thereon against the county. The plaintiff has acquired that title to the coupons detached from said bonds, and on the strength thereof is entitled to recover on each series of coupons." *Rathbone v. Board of Comrs. of Kiowa County, Kan.*, 27 C. C. A. 477, 83 Fed. 125.

Bona fide purchaser of bonds relieved of notice of contents of records in view of recitals in bonds; bonds refunding an illegal debt; estoppel.

288. (Kan. 1898.) Bonds were issued by the board of commissioners of Haskell county, Kansas, on June 4, 1889, to become due July 1, 1918, containing a recital that they were "issued in accordance with the provisions of an act of the legislature of the State of Kansas, approved March 8, A. D. 1879, entitled 'An act to enable counties, municipal corporations, the board of education of any city, and school districts to refund their indebtedness,' and that 'all and sin-

gular the provisions of the above law have been fully complied with in issuing this bond, and all preliminary steps therein required have been taken, and all conditions precedent and subsequent there provided for have been fully met and complied with."

If an action upon interest coupons cut from such bonds, the county urged as a defense that the pretended indebtedness refunded by this issue of bonds was illegal and void, being ten bonds which had been executed by the board of commissioners April 13, 1889, in pursuance of an unconstitutional law, but which had never been sold or issued and constituted no indebtedness of the county; that the records of the proceedings of the board authorizing the issuance of the refunding bonds disclosed these facts and the invalidity of the refunding bonds, and that the purchaser of the bonds in the open market was bound by what such records disclosed. Held, following the decision of the Supreme Court, in *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. Rep. 613, 40 L. Ed. 760: "The result is that the recital in the bonds before us, that they were issued in accordance with the provisions of the statute, imports that they were issued in pursuance of a lawful and proper resolution, and of honest and just action on the part of the board of county commissioners under that statute. It relieves the innocent purchaser of all inquiry, notice, and knowledge of the actual action and record of the board, and estops the county from denying that proper action was taken, and that a lawful resolution was passed." *Board of Comrs. of Haskell County, Kan., v. National Life Ins. Co. of Montpelier, Vt.*, 32 C. C. A. 591, 90 Fed. 228.

Bonds refunding a debt in part, not debt of city; holder charged with notice of records disclosing invalidity of debt refunded; no estoppel by recitals; no authority in officers to make certificate of character of debt.

289. (Cal. 1899.) Bonds in the amount of \$360,000 had been issued by the mayor and common council of the city of Santa Cruz, purporting to have been issued for the purpose of refunding the bonded indebtedness of said city. The indebtedness so re-

funded consisted of \$271,000 of outstanding bonds of the city, and \$89,000 of mortgage bonds which had been executed by and made a lien upon the water-works system of the City Water Company of Santa Cruz, which water-works system was thereafter conveyed by the company to the city, subject to the lien of the mortgage bonds.

The refunding bonds recited that they were issued in pursuance of and in conformity with the provisions of an act of the legislature, approved March 1, 1893, which, the court held, contained no express grant of power to issue any bonds, but did impliedly authorize the issuance of refunding bonds for the purpose of refunding the outstanding bonds and warrants of the city, provided a majority of the electors of the city should vote in favor of such refunding upon submission of the question to them in the mode prescribed in the act. The bonds contained also further recitals importing full compliance with the law and the legality of the indebtedness refunded. The question of issuing the bonds to refund the city bonds and the water company's bonds was submitted to the electors by ordinance adopted February 26, 1894, and the result was in favor of the proposed refunding. Held, that the said act of March 1, 1893, conferred no authority for the issuance by the city of any bonds for the purpose of refunding the indebtedness of the water company. Held, further, that, as the bonds issued for that purpose were in no way segregated from the others of the same issue, the plaintiff could only be permitted to recover by sustaining his contention that he was a bona fide purchaser, without notice of the infirmity in the bonds. Held, also, that, as the power conferred by the act on the mayor and council could only be exercised at a meeting of the municipal board by order, ordinance, or resolution, and was in this instance by ordinance, which was a part of the public records of the city, and which, by its charter, were required to be kept "in large, well-bound, uniform, and suitable books," the record of the ordinance was intended, under the law, to disclose to all the world the specific indebtedness that it was proposed to refund, and that the officers impliedly charged with the issuance of the bonds

were not authorized to make any certificate or representations to prospective purchasers in respect to the character of the debt refunded. Held, also, that, as the statute required the specific indebtedness intended to be refunded to be entered upon the records of the governing body of the city, the plaintiff was bound by what such records disclosed, and could not recover on the ground of being a bona fide holder. *City of Santa Cruz v. Waite*, 30 C. C. A. 106, 98 Fed. 387.

Ordinance; time of taking effect; effect of recitals in bonds of compliance with conditions.

290. (Ohio, 1900.) "Reference is also made by counsel for defendant to the fact that a statute of Ohio provides that ordinances shall not go into effect until ten days after publication thereof is had, and that the ordinance of March 15, 1892, was not published until the 20th of that month, whereas the bonds are dated March 1st, and it is therefore claimed that the ordinance was not operative when the bonds were issued. To this there are several answers. In the first place, there is no evidence when the bonds were negotiated by the village. Secondly, February of that year having twenty-nine days, by excluding the first and including the last days, it became operative on the 1st day of March. But, lastly, it is recited in the bond that 'all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed in regular and due form as required by law.' If, as contended, the passage and publication of the ordinance was a condition precedent to the issuing of the bonds, this recital represented that these things had been done." *Village of Kent v. Dana*, 40 C. C. A. 281, 100 Fed. 56.

Bona fide holder; recitals in bonds of full compliance with law; records disclosing invalidity, held not to be notice; estoppel.

291. (S. Dak. 1900.) Funding bonds were issued by Hughes county containing certain recitals required by the

statute, which was relied upon as authority for their issue, and a further certificate that they were issued in accordance with an election duly held under said act, and that all acts, conditions, and things required to be done precedent to and in the issuing of the bonds had been properly done, happened, and performed in regular and due form as required by law.

In an action by a bona fide holder upon coupons cut from such bonds, it was urged, among other things, that an examination of the records of the board of county commissioners would have disclosed various facts on account of which the bonds should be held invalid, and that the contents of such records was notice to every one. Held, that the recitals in the bonds were conclusive upon the county, and that the innocent purchaser was relieved "of all inquiry, notice, and knowledge of the actual action and record of the board."

"The legal effect of the recital that these bonds were issued in pursuance of the act of 1880 was that they were issued to fund a valid debt of the county of the character described in section 11 of that act; that a lawful proposition for their issue had been submitted to and sustained by the favorable vote of the electors of the county; that the bonds had been duly advertised for sale; that they had been properly registered; and that every other fact existed, and every other act had been done, which, under the act of 1880, conditioned a lawful issue of the bonds." *Hughes County, S. Dak., v. Livingston*, 43 C. C. A. 541, 104 Fed. 306.

Purchasers of bonds, when not under duty to examine ordinances of the city, to ascertain if recitals were true.

292. (Cal. 1902.) "As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded. They were under no

duty to go further and examine the ordinances of the city to ascertain whether the recitals were false. On the contrary, purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds." *Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. Rep. 327, — L. Ed. —.

Purchaser not charged with notice of contents of resolution recited in bonds.

294. (Iowa, 1902.) "These decisions and opinions of the Supreme Court conclusively answer the question presented in this case, and render any independent discussion of it unnecessary and useless. They demonstrate the fact that, so far at least as the

federal courts are concerned, it is now the settled law of this country that a bona fide purchaser of municipal bonds, which recite that they were issued in pursuance of a statute which authorized the municipality to send them forth for a lawful purpose, and which also recite that they were issued in conformity with an ordinance or resolution whose date or title is specified in the recital, which, if read, would disclose the fact that they were issued for an unlawful purpose, is not charged with notice of the terms or contents of the ordinance or resolution, and the municipality cannot avail itself of the facts there disclosed to defeat its bonds." *Fairfield v. Rural Ind. School District*, 54 C. C. A. 342, 116 Fed. 838.

C. Other Public Records and Data of Which Purchasers of Municipal Bonds Must Take Notice.

Assessment-rolls as notice.

295. (Kan. 1875.) "The assessment-rolls of the township may have been proper evidence for the consideration of the board of county commissioners, when they were inquiring what the value of the taxable property of the township was; but the bonds are not invalid in the hands of a bona fide holder by reason of their having been voted and issued in excess of the statutory limit, as shown by the rolls. Whatever may be the right of the township as against those who issue the bonds, it cannot set up against a bona fide holder of the bonds that the amount issued was too large, in the face of the decision of the board, and their recital that the bonds were issued pursuant to and in accordance with the act of 1870." *Humboldt Township v. Long*, 92 U. S. 642, 22 L. Ed. 752.

Official assessment-rolls.

296. (Ill. 1880.) A purchaser of city bonds is bound to take notice of the constitutional limitation upon the municipal indebtedness, and of the facts disclosed by the authorized official

assessments of the taxable property within the city. *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138.

Record of assessed valuation of property for taxation as notice of excessive issue of bonds.

297. (Neb. 1884.) The amount which a county might donate in aid of the construction of railroads was limited to ten per cent. upon the assessed value of property in the county, for taxation. A county issued bonds in excess of this limit. Held, that, notwithstanding any recitals the bonds might contain, the county was not estopped to show the fact that the authority had been exceeded, inasmuch as the record of the assessed value of property was notice to all of the limitation and the amount of bonds which might lawfully be issued. *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315, 28 L. Ed. 360.

For a more complete statement of the facts of this case and a discussion of the above proposition, see same case in Chapter VII, Division C, No. 544.

Purchaser of bonds bound to know assessed valuation.

298. (Colo. 1889.) A purchaser of bonds of a county in Colorado, which disclosed on their face the amount of the debt, for the purpose of determining whether the constitutional limit of indebtedness has been exceeded, is bound to know, regardless of recitals in the bonds, the amount of the assessed value of the taxable property in the county as disclosed by the public records. *Lake County v. Graham*, 130 U. S. 674, 9 Sup. Ct. Rep. 654, 32 L. Ed. 1065.

State and county tax lists; purchasers of bonds must take notice of.

299. (Iowa, 1892.) Under the provision of the Constitution of Iowa, limiting municipal indebtedness to five per centum on the value of the taxable property within such county, "To be ascertained by the last State and county tax lists previous to the incurring of such indebtedness," such State and county tax lists are "public records open to all, and of the contents of which all are bound to take notice." *Doon Township v. Cummins*, 142 U. S. 366, 12 Sup. Ct. Rep. 220, 35 L. Ed. 1044.

Purchaser bound by assessment-rolls and by what bonds disclose.

300. (Iowa, 1892.) Plaintiff purchased a single issue of bonds of Riverside Independent District, which alone exceeded the limit allowed by the Constitution. There was other indebtedness of the district.

"If not charged with knowledge of the prior indebtedness, she was with the fact that, independent of such indebtedness, these bonds alone were an overissue, and beyond the power of the district; for she was bound to take notice of the value of taxable property within the district, as shown by the tax list. *Buchanan v. Litchfield*, 102 U. S. 278; *Northern Bank v. Porter Township*, 110 U. S. 608; *Dixon County v. Field*, 111 U. S. 83. In the first of those cases, on page 280, it is said that 'the purchaser of the bonds was certainly bound to take notice not only of the constitutional limitation upon municipal indebtedness, but

of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city for the year 1873;' and in the last, on page 95, that 'the amount of the bonds issued was known. It is stated in the recital itself. It was \$87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers.' So, when the plaintiff purchased these bonds, she knew, or at least was chargeable with knowledge of the fact, that they were unlawfully issued, and created no obligation against the district. She could not therefore claim to be a bona fide purchaser, no matter what recitals appeared on the face of the instruments." *Nesbit v. Riverside Independent District*, 144 U. S. 610, 12 Sup. Ct. Rep. 746, 36 L. Ed. 562.

Record of county indebtedness; purchaser charged with notice of.

301. (Colo. 1893.) A statute of Colorado required the county commissioners of counties in that State to publish, and cause to be entered on their records, open to the inspection of the public at all times, semi-annual statements exhibiting in detail the debts, expenditures, etc., of the counties. Bonds were issued by the commissioners of Lake county in excess of a limitation prescribed by the State Constitution. Plaintiff purchased the bonds without notice of the overissue, in good faith, and in reliance upon recitals contained in the bonds. Held, "Upon these facts, in the light of the previous decisions of this court, it is clear that the plaintiff, although a purchaser for value and before maturity of the bonds, was charged with the duty of examining the record of indebtedness provided for in the statute of Colorado, in order to ascertain whether the bonds increased the indebtedness of the county beyond the constitutional limit; and that the re-

citals in the bonds did not estop the county to prove by the records of the assessment and the indebtedness that the bonds were issued in violation of the Constitution. In those cases in which this court has held a municipal corporation to be estopped by recitals in its bonds to assert that they were issued in excess of the limit imposed by the Constitution or statutes of the State, the statutes, as construed by the court, left it to the officers issuing the bonds to determine whether the facts existed which constituted the statutory or constitutional condition precedent, and did not require those facts to be made a matter of public record." *Sutliff v. Lake County Comrs.*, 147 U. S. 230, 13 Sup. Ct. Rep. 318, 37 L. Ed. 145.

Single issue of bonds exceeding statutory limit; notice of assessment-rolls.

302. (Tex. 1893.) A purchaser of an issue of bonds which exceeded the statutory limit, being charged with notice of the contents of the assessment-rolls of the county, is not protected, and the county is not estopped by recitals in the bonds importing compliance with such legal limitation. *Francis v. Howard County*, 4 C. C. A. 460, 54 Fed. 487.

When bonds and assessment-rolls show the issue to be excessive.

303. (Tex. 1893.) A single issue of bonds issued by Howard county, Texas, was in an amount exceeding a statutory limitation based upon the amount of the assessment of taxable property. They contained a recital importing compliance with law in their issuance. The total issue was purchased by one person, who transferred same to plaintiff. Held, that plaintiff was not protected by recitals; that he was charged with notice of what the county assessment-rolls disclosed and of the amount of bonds which could be validly issued based on such assessment, and that he had actual notice that this issue alone was excessive and consequently invalid. *Francis v. Howard County*. 4 C. C. A. 460, 54 Fed. 487. Followed

in *Quaker City Nat. Bank v. Nolan County*, 14 C. C. A. 157, 66 Fed. 883.

Bonds issued before time fixed by law; time of organization of county; purchaser of bonds chargeable with notice of records, notwithstanding recitals in bonds.

304. (Kan. 1893.) A statute of Kansas prohibited the issuing of bonds by counties within one year after their organization. Bonds were issued by Kearney county within the year after its organization, and, holding them to be void, the court say that, notwithstanding any recitals the bonds may contain, there can arise no estoppel preventing the county from showing as a defense to the bonds that they were issued without authority, inasmuch as the fact which rendered the bonds invalid was a matter of public record, open to the inspection of every one disposed to make inquiries. *Coffin v. Board of Comrs. of Kearney County*, 6 C. C. A. 288, 57 Fed. 137.

Town's agreement to exempt property from tax not binding on bondholders; memorandum of same on assessment-rolls.

305. (S. Car. 1895.) In an action against the town of Darlington on its bonds, it was contended by the town that the holder was bound by a memorandum made on the assessment-rolls of the town, that the property of a manufacturing company included in such rolls was exempt from taxation by an agreement between the town and the company, and that, with such exemption, the bonds created a debt in excess of the constitutional debt limit. Held, that such memorandum was properly excluded when offered in evidence.

"Will a statement of the character indicated—will an indorsement made by the town clerk on the official assessment-rolls to that effect—serve to release the property so referred to from taxation? Can the provision of the Constitution of South Carolina, by which only property used for municipal, literary, scientific, or charitable purposes is exempt from taxation, be rendered inoperative by such

action on the part of the custodian of the records of the towns in that State? Certainly not, and the mere statement of such a proposition should be its own refutation. It follows that the court below did not err in excluding such testimony."

Town's official account-books not admissible to prove that the bonds in suit created an excessive debt.

"The books so offered were not public records in any such sense as to make their contents evidence. There was no effort made to verify the entries, nor to lay the foundation required to authorize the witness to testify as to the entries not made by him. The party making part of the record was not produced, nor was his absence accounted for. It does not appear what part of the entries in the books were made by the witness nor when they were made, whether before or after the institution of the suit, or whether they were made with direct reference to the defense of the same. Again, so far as the record discloses, the entries offered and excluded may have been entirely of the character that cannot be given in evidence by the party in whose behalf they were made. It is well established that a private entry in the books of a municipal corporation will fall within the rule applicable to private books, and cannot be given in evidence by the party by whose direction it was made. *Dill Mun. Corp.* (4th ed.), § 304, note; 15 *Am. & Eng. Ency. Law*, 1076." *Town of Darlington v. Atlantic Trust Co.*, 16 C. C. A. 28, 68 Fed. 849.

Records of bonds issued, their date, number, etc.

306. (Kan. 1895.) A statutory requirement that the county clerks shall "keep a record of all bonds issued in their respective counties, the date, number, and amount thereof, to whom and on what account issued, and when the same become due," does not affect the negotiability of such bonds." *West Plains Township, Meade County, v. Sage, et al.*, 16 C. C. A. 553, 69 Fed. 943.

Official records only are constructive notice.

307. (Kan. 1893.) Matters placed in the corporate records of a township, which are not properly a part of the official records, do not charge purchasers of bonds with constructive notice of their contents, whether they appear in the same book with the records of the board or elsewhere. *West Plains Township, Meade County, v. Sage, et al.*, 16 C. C. A. 553, 69 Fed. 943.

Abstract of county assessment filed with auditor of state.

308. (Neb. 1897.) "The abstract of assessment of property in Valley county for the year 1879, made by the county clerk, and by him certified and transmitted to the auditor of the State, was a public record of the assessment which the statute required to be so made and transmitted, after the assessment-books had been equalized and corrected by the county board. A purchaser of bonds, in determining whether the aggregate issue exceeded the statutory limit of ten per cent. of the assessed valuation, had the right to rely upon this abstract as a public record, authorized by statute to be made, as showing the amount of the assessment as finally corrected and established by the board of equalization, and was not required to look through the books of the precinct assessors, and minutes of the board of equalization, if such minutes were kept, to verify such public record." *Valley County v. McLean*, 25 C. C. A. 174, 79 Fed. 728.

County indebtedness; recitals in bonds estop county, when required record not made.

309. (Colo. 1897.) "The bonds in question in this case were issued under the provisions of the act of March 24, 1877, which is expressly referred to in the recital in the bonds, and six sections of which were printed upon the bonds. This act, by its terms, commits to the board of county commissioners the power to determine the necessity of creating an indebted-

ness for the erection of public buildings, and of submitting the question to a vote of the qualified electors at a general election, and of issuing the bonds, if the vote is favorable, keeping within the limitation contained in section 21 in respect to the aggregate indebtedness of the county at the time of issuing the bonds. The granting of these powers necessarily intrusts to the board of county commissioners the power and duty of determining whether the proposition to create the indebtedness was carried at the election, and the ascertainment of the fact that the aggregate amount of all forms of the county indebtedness was within such amount that it would not, by the issue of the bonds, be made to overpass the prescribed limitation. Hence, except for the provision contained in section 30 of the same act, requiring the board to make and publish the semi-annual statements of the indebtedness and financial condition of the county, and requiring the clerk of the board to record such statements in a book to be kept for that purpose only, and to be open to public inspection, the recitals in the bonds above quoted would be conclusive, and would estop the county in a suit by a bona fide holder of the bonds or coupons." Held, however, that, as no such record of indebtedness as the law required had been made in this instance, the purchaser was entitled to rely upon the recitals in the bonds. A number of cases cited and discussed in the opinion. *Dudley v. Board of Comrs. of Lake County, Colo.*, 26 C. C. A. 82, 80 Fed. 672.

County records; limit of indebtedness.

310. (Colo. 1897.) Funding bonds were issued by Gunnison county under an act which made it the duty of the board of county commissioners to determine the amount of county indebtedness, and make a certificate thereof, and spread the same upon the records of the county as one of the initial steps toward an issuance of refunding bonds. Such determination, certificate, and record were made before the bonds were issued. Another statute required statements to be made and

recorded semi-annually exhibiting the county's financial condition.

The bonds contained a recital "that the total amount of this issue does not exceed the limit prescribed by the Constitution of the State of Colorado." Held, that, as the statement entered of record at the time the bonds were issued did not disclose an indebtedness beyond the constitutional limit, in view of the recitals in the bonds, purchasers had a right to assume that the debt limit had not been exceeded, and were not bound by what the semi-annual statements disclosed. *E. H. Rollins & Sons v. Board of Comrs. of Gunnison County, Colo.*, 26 C. C. A. 91, 80 Fed. 692.

Semi-annual statement required by law showing county's financial condition; what is competent evidence against bona fide purchaser.

311. (Colo. 1899.) "But section 30 of the act under which these bonds were issued required the county commissioners to make out semi-annual statements at their regular sessions in January and July in each year, which would show the amount of the debt owing by their county; in what it consisted; what payment had been made upon the same; the rate of interest its debts were drawing; and a detailed account of the receipts and expenditures of the county for the preceding months, in which it should appear from what officer and on what fund any money had been received, and the amounts and to what individuals and from what account any money had been paid, and the amounts and the balance, showing the amount of deficit, if any, and the balance in the treasury, if any; and it required the commissioners to publish these statements, and to cause their clerk to record them in a book kept by him for that purpose only, which should be open to the inspection of the public at all times. Gen. Laws Colo. 1877, p. 227, par. 457, § 30." Held, that, if such record had been made, a purchaser of the bonds or coupons involved in this suit would have been charged with the notice of the facts which it disclosed, notwithstanding

recitals in the bonds importing compliance with legal requirements. Held, also, that the converse was true and that, "When the Constitution, or the act under which the bonds are issued, prescribes the public record which furnishes the test of compliance with the limitation, the purchaser is not required to look beyond it; but, if that record fails to show a violation of the limitation, he may rely upon the presumption that the officers faithfully discharged their duty when they issued the bonds, and upon the recitals which they contain, and the corporation will be estopped from proving other records or facts to overthrow them. *E. H. Rollins & Sons v. Board of Comrs. of Gunnison County*, 49 U. S. App. 399, 403, 26 C. C. A. 92, 96, and 80 Fed. 692, 697; *Dudley v. Board*, 80 Fed. 672, 677, 26 C. C. A. 82, 86, and 49 U. S. App. 330, 344. This rule disposes of the complaint of counsel for the plaintiff in error that the court below refused to receive in evidence the register of the county bonds, the register of the county warrants, and the minutes of the proceedings of the board of county commissioners, in which some reference to the indebtedness of the county appears." Held, also, that, in the absence of such records, the county clerk's and county treasurer's account-books and other accounts and records made and kept by the county officials were not competent evidence, in an action against the county on bonds in the hands of bona fide holder, as against recitals in the bonds importing compliance with such debt limitation. Held, also, that bond buyers were not required to search the minutes and records of proceedings of the county commissioners relating to the issuance of such bonds.

"A buyer of municipal bonds is not required to search the proceedings of the county commissioners, and through all the books of the clerk of their board, to ascertain the indebtedness of the county, when the statute points him to a specific record for his guidance, and the officers of the county have failed to make that record, and have certified upon the face of their

bonds that the limitation has not been violated. The minutes of the meetings of the commissioners and the registers of the bonds and warrants of the county constituted no notice of the county indebtedness to a bona fide purchaser of these bonds." *Sutcliffe v. Lake County Comrs.*, 147 U. S. 230, 13 Sup. Ct. Rep. 318, 37 L. Ed. 145, distinguished. *Board of Comrs. of Lake County, Colo., v. Sutliff*, 38 C. C. A. 107, 97 Fed. 270.

County clerk's account-book not legal evidence.

312. (Colo. 1901.) An account-book kept by the county clerk, but not in pursuance of the requirements of any statute, purporting to show outstanding warrants and the amount of indebtedness of the county at different times, is not competent evidence in favor of the county.

It does not comply with a statute of Colorado, which requires a public record of the indebtedness of the county to be made in a certain way and to be published at certain times. *Board of Comrs. v. Keene Five-Cent Savings Bank*, 108 Fed. 505, 47 C. C. A. 464.

Constitutional limitations; excessive issue; public records and recitals in bonds as notice.

313. (S. Dak. 1909.) "The validity of the bonds is conditioned by the Constitution upon two facts: The assessed value of the taxable property of the township, and the amount of its indebtedness. All the authorities agree that the purchaser of municipal bonds subject to such a limitation is bound to ascertain at his peril from the public records the assessed valuation of the property within the municipality. Recitals in the bonds afford him no protection upon that subject. *Suttliff v. Lake Co. Commissioners*, 147 U. S. 230, 13 Sup. Ct. 318, 37 L. Ed. 145; *Dixon Co. v. Field*, 111 U. S. 53, 4 Sup. Ct. 315, 28 L. Ed. 360; *Gunnison Co. Commissioners v. Rollins*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689. These authorities are equally emphatic that, if the bonds disclose upon their face an issue in

excess of the constitutional limitation, a purchaser cannot rely upon a recital to the contrary. In our judgment the bonds here sued upon, when properly construed, contain such a disclosure. Each bond stated that it was one of a series numbered from one to twenty-three, inclusive, of like tenor and date. The bonds in suit also show, upon their face that they were the last of the series, and fairly import that the preceding numbers had already been issued. Does the statement that all the series were of 'like tenor' fairly indicate that the bonds were all for \$500 each? We think it does. The word 'tenor' has a clear, legal signification. According to Bouvier it means 'an exact copy of a writing, set forth in the words and figures

of it. It differs from purport, which is only the substance or general import of the instrument.' So far as we are aware, the term has never had any other meaning in the law. It is here used in a legal instrument, and, there being nothing to evidence a different intent, it should be given its ordinary legal significance. So interpreted, the bonds clearly informed the purchaser that their issue created an indebtedness of \$11,000, a palpable violation of the constitutional restriction. An estoppel cannot arise in favor of the purchaser of municipal bonds which thus bear upon their face the evidence of their invalidity." *St. Lawrence Tp. v. Furman*, 96 C. C. A. 356, 171 Fed. 400.

CHAPTER VI.

EXECUTION, DELIVERY, FORM, AND CONTENTS OF MUNICIPAL BONDS; REGISTRATION, ETC.

- A. Municipal bonds must be executed by the officers designated, in the manner, with the formalities, and within the limitations prescribed by law.
- B. Authorized delivery of municipal bonds necessary to their validity.

Enabling statutes generally contain explicit directions as to what officers shall execute the bonds of a municipality, and when such directions are given it is necessary to the validity of such securities that they be executed by the officers designated.

In some enabling acts no directions are contained as to any particular form of words, or statements, or recitals, which such instruments shall contain, or as to other formalities of execution; but in a large number of cases such statutes contain directions that certain statements or recitals shall be embodied in the bonds and contain specific directions concerning the form and manner of execution.

When no such provisions are contained in the act, the bonds may be in any usual form importing the character of negotiable instruments; but when the act directs that the bonds shall be executed in a particular form or shall contain certain recitals, it is generally necessary to their validity as negotiable instruments that such requirements be substantially complied with. In all cases, unless the enabling act prescribes a form to be used, the bonds should contain some statement or recital indicating the purpose for which, or the authority under which, they are issued; as otherwise there would generally be no presumption in favor of their validity, and, in an action on them, for collection, the authority for their issuance, and, in some instances, the consideration on which they had been issued, would have to be pleaded and proven in order to show *prima facie* a right to recover; but in most cases, when the bonds, being properly executed, show by appropriate statements or recitals that they have been issued in pursuance of an existing legal authority, either by indicating the

purpose for which, or the law under which, they were issued, a valid consideration for their issuance will be presumed, until such presumption shall be overcome by proof to the contrary, especially in favor of a bona fide holder for value.

Any requirements of law in regard to signing, sealing, attesting, registering, or other matters pertaining to the form or manner of execution of such bonds should be carefully observed, as a failure to substantially comply with such statutory directions will generally affect the negotiable quality of the securities and will often render them absolutely invalid.

Unless the statute prescribes the form of such bonds and the recitals which they shall contain, and by what officers they shall be executed, such matters should all be provided for by express direction of the board or officers who are authorized to direct their issuance, and such directions should be carefully embodied in the ordinance, resolution, or order providing for their issuance.

It must not be assumed that, when the statute prescribes that the bonds shall contain certain statements and recitals, other and additional statements or recitals, inserted in the bonds in the nature of assurances or certificates of legality, will be disregarded by the courts. On this particular point, as to the effect of recitals in municipal bonds, see chapter VII.

It is necessary to the validity of municipal bonds that they shall be delivered by, or by the direction of, the board, officers, or persons authorized to make or direct such delivery on behalf of the body issuing them.

Such authorized delivery is necessary to their complete execution as obligations of the municipality; and an unauthorized delivery will neither convey title to the securities nor give them vitality as obligations in favor of the original taker or subsequent purchasers or holders.

The rules of law relating to the delivery of municipal securities are not different from those relating to the delivery of other negotiable securities by the makers thereof, except as to the authority of the agents or officers by which such deliveries may be made.

An unauthorized delivery of municipal securities may, in some cases, be ratified by the action or acquiescence of those who might have originally made or directed a delivery.

The subject of ratification is treated of in chapter VIII of this work.

A. Municipal Bonds Must be Executed by the Officers Designated, in the Manner, with the Formalities, and within the Limitations Prescribed by Law.

314. (Pa. 1860.) Bonds signed by two of three members of the board of county commissioners held to be sufficient. *Jacob E. Curtis, Plaintiff, v. The County of Butler*, 24 How. 435, 16 L. Ed. 745.

Effect of corporate seal on bonds.

315. (Pa. 1863.) The fact that municipal bonds bear the corporate seal of the body issuing them does not affect their negotiability. *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548.

Bonds payable beyond limits of county issuing them.

316. (Iowa, 1872.) It is not a valid objection that the bonds were made payable and were sold beyond the limits of the county of Winnebago and of the State of Iowa. "The power to issue them carried with it authority to the county judge as to both these things—to do what he deemed best for the interests of the county for which he was acting." *Lynde v. The County*, 16 Wall. 6, 21 L. Ed. 272.

Execution of bonds by agents designated by legislature; power of legislature to bind municipality in this way.

317. (N. Y. 1873.) Bonds with interest coupons attached, both signed by commissioners designated by the enabling statute to so execute them, purported to be obligations of the town of Queensbury. It was urged that the town was not liable on the coupons. Held, that the town was liable.

"It is vain to say that the statute imposed no duty upon the town or its officers. No one can doubt that it is competent for the legislature to determine by what agents a municipal corporation shall exert its powers. The statute in question did designate the agents, and their acts, within the authority conferred, are binding upon their principal, upon the town of which they had been constituted the agent." *Town of Queensbury v. Culver*, 19 Wall. 83, 22 L. Ed. 100.

Contents of bonds affecting negotiability.

318. (Kan. 1875.) "The first question certified from the court below is, whether the bonds to which the coupons in suit were attached are negotiable bonds, such as to entitle the plaintiff to the rights of a bona fide holder of negotiable paper taken in the ordinary course of business before maturity. They are certificates of indebtedness to the railroad company, or bearer, each for \$1,000, lawful money of the United States, payable on a day certain, with interest at the rate of 7 per cent., payable annually on the first days of January in each year, at a specified banking-house, on the presentation and surrender of the respective interest-coupons thereto annexed. If this were all, there could be no doubt of their complete negotiability. But it is said the subsequent language of the certificates controls the absolute promise, and shows that payment was to be made only on a contingency. This is argued from the recital contained in the instrument, and from what follows it. We quote: 'This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott & Allen County railroad, and for the construction of the same through the said township, in pursuance of, and in accordance with, an act of the legislature of the State of Kansas, entitled "An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25, 1870;" and for the payment of the said sum and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humbolt township, as also its property, revenue, and resources, is pledged.' Relying upon this clause of the certificate, the township contends that the construction of the railroad through the township was a condition upon which the payment was agreed to be made. We think, however, this is not the true construction of the contract. The construction of the road, as well as the subscription for stock, were mentioned in the recital as the reasons why the township

entered into the contract, not as conditions upon which its performance was made to depend. It was for the purpose of subscribing, and to aid in the construction of the road, that the bond was given. The words, 'upon the performance of the said condition,' cannot then refer to anything mentioned in the recital, for there is no condition there. A much more reasonable construction is that they refer to a former part of the bond, where the annual interest is stipulated to be payable at a banker's 'on the presentation and surrender of the respective interest coupons.' Such presentation and surrender is the only condition mentioned in the instrument. It is what is always implied in every promissory note or bill of exchange—that it is to be presented and surrendered when paid. As well might it be said that a note payable on demand is payable upon a contingency, and therefore nonnegotiable, as to affirm that one payable on its presentation and surrender is, for that reason, destitute of negotiability." *Humbolt Township v. Long*, 92 U. S. 642, 22 L. Ed. 752.

Railroad company not correctly named in the bonds.

319. (Kan. 1876.) Bonds are not invalid because the name of the railroad company to which they were issued was not correctly stated in the bonds. *County of Leavenworth v. Barnes*, 94 U. S. 70, 24 L. Ed. 62.

320. (Kan. 1876.) The bonds in this case recited the wrong act as the authority for their issuance. Held, that they were not thereby rendered invalid. *Comrs. of Johnson County v. January*, 94 U. S. 202, 24 L. Ed. 110.

Form of bonds; manner of execution.

321. (Kan. 1876.) The sufficiency and legality of the form and manner of execution of municipal bonds must be tested by the law of the jurisdiction where they are issued. An enabling act provided that county bonds should not be made to run for a longer period than thirty years. Held, that bonds issued so as to become due within thirty years from the date of their actual issuance complied with the law in that regard, notwithstanding they matured thirty years and twenty-seven days from their date.

Time of payment of principal and interest.

"Where a municipal corporation has power to borrow money, they may make the principal and interest payable when they please." *Comrs. of Marion County v. Clark*, 94 U. S. 278, 24 L. Ed. 59.

Interest payable semi-annually.

322. (Iowa, 1863.) It is no objection to the validity of bonds that interest at 10 per cent. per annum was made payable semi-annually under a statute providing for interest at a rate "Not higher than ten per cent. per annum." "This objection has no foundation. When a statute fixes the rate of interest per annum, it has always been held that parties may lawfully contract for the payment of that rate, before the principal debt becomes due, at periods shorter than a year."

Interest payable in New York city.

It does not affect the validity of bonds that the interest thereon was made payable in New York city, instead of at the treasury of the city issuing them. *Meyer v. City of Muscatine*, 1 Wall. 384, 17 L. Ed. 564. *Comrs. of Marion County v. Clark*, 94 U. S. 278 (284), 24 L. Ed. 59.

"Time of payment of bonds."

323. (Kan. 1877.) "Are the bonds mentioned in the plaintiff's petition void, for the reason they are made payable for thirty years and thirty-five days from their date of execution therein written, but only drawing interest for the last thirty years of said time? The second section of the act authorizing their issue enacted that the bonds should be payable in not less than five nor more than thirty years from the date thereof, with interest not to exceed ten per cent. per annum, all in the discretion of the officers issuing the same. These provisions were obviously directory, and not of the essence of the power. The bonds issued were dated September 10, 1872, made payable thirty years from the 15th day of October, 1872, with interest thereon from that time at the rate of 7 per cent. When they were delivered to the railroad company does not appear, though they were not registered by the auditor of the State until October 17, 1872. They were

thus practically thirty-year bonds, bearing a less rate of interest than the rate authorized. Their legal effect is precisely what it would have been had the date inserted been October 15, instead of September 10, 1872. Substantially, therefore, the legislative direction was followed. The doctrine of *Comrs. of Marion County v. Clark*, 94 U. S. 278, is applicable to the present case."

Certificate of registration on bonds by auditor of state.

"The defendant further offered to show that no registration of the bonds exists, or ever has been in the office of the auditor of the State, though the auditor's certificate of registration does appear upon the bonds. We cannot think this evidence, if admitted, could in any degree avail the defendant. The certificate of that officer indorsed on the bond was all that was required for the holder of them. If the State auditor failed to make in his office an entry of his action, we do not perceive how his failure in this respect can invalidate bonds upon which he has certified a registration." *Township of Rock Creek v. Strong*, 96 U. S. 271, 24 L. Ed. 815.

324. (Tex. 1877.) The absence of a seal on city bonds held to be immaterial. *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816.

Bonds countersigned by a person whose term of office as clerk has expired.

325. (Miss. 1878.) Bonds were issued by a town in Wisconsin bearing date of June 1, 1871.

"At that time Fenelon was chairman and Verke clerk. The signatures of these officers were lithographed and printed on the coupons. Before the bonds were actually signed by Verke, he had resigned his office and moved out of town. Another clerk had been appointed and qualified in his place. Apparently to save the expense of a new lithograph and another printing of the bonds, Verke, after going out of office, affixed his signature to those which had been printed. These bonds so signed by Verke and by Fenelon who actually was chairman at the time, were taken by Fenelon and delivered to the railroad company. This having been done, Ayling, the defendant in error, purchased the bonds to which the coupons sued on were attached,

and paid their full value without notice of any claim of defense to their due execution. Under these circumstances we think the town is estopped from proving that Verke in fact signed the bonds after he went out of office. If Ayling had put himself on inquiry when he made his purchase he would have found, 1, that the town had authority to vote the bonds; 2, that the necessary vote had been given; 3, that at the date of the bonds Verke was clerk and Fenelon chairman; 4, that their signatures were genuine; 5, and that the bonds had actually been delivered to the railroad company by Fenelon, who was at the time chairman." *Town of Weyauwega v. Ayling*, 99 U. S. 112, 25 L. Ed. 470.

Statutory requirements as to form of bonds directory.

326. (Miss. 1878.) Bonds were issued by Calhoun county, Mississippi, to a railroad company, in payment for stock subscribed by the county in said company. The enabling act declared that the bonds should be made payable "To the president and directors of the G. H. & E. Railroad Company and their successors and assigns." The bonds were made payable to the G. H. & E. Railroad Company, or bearer, at the agency of said county in the city of New York, two years after date. It was urged that this deviation from the requirements of the law in the form of the bonds rendered them invalid. Held, that the statutory requirement was only directory. "The defect is one of form and not of substance. The irregularity was committed by the servants of the county, and the county is estopped to take advantage of it."

Place of payment.

No place of payment of the bonds being designated by the statute, it was competent for the supervisors to make them payable in New York. *Supervisors v. Galbraith*, 99 U. S. 214, 25 L. Ed. 410.

Municipal officers; extent of authority.

327. (Kan. 1878.) "The township trustee and the township clerk who made the subscription and issued the bonds in this case were the officially constituted authorities of the township, and when they subscribed to the stock and issued the bonds they acted in their official capacity as the legal

representatives of the township, and not as mere agents. In this particular they occupied the position of the County Court in the Scotland county case. They were to all intents and purposes the township in its corporate capacity. In *Harshman v. Bates County*, 92 U. S. 569, the case was different. There the County Court was the mere agent of a corporation, with which it had no official connection. The difference between the two cases is precisely that between a principal and an agent, and it is so expressly said in the Scotland county case. In the one case the corporation is bound if the action of the officers is within their corporate powers, while in the other the action must be within the corporate powers delegated to the agent." *Wilson v. Salamanca*, 99 U. S. 499, 25 L. Ed. 330.

Registration and certificate by state auditor; a condition precedent to issue.

328. (Mo. 1879.) A statute of Missouri required that bonds issued by municipalities in that State should be presented to the auditor of the State for registration in his office and certification thereof by him before they should obtain validity or be negotiated. Held to be an essential part of the execution of the bonds, in the absence of which they were invalid.

"When the bonds now in question were put out, the law required that to be valid they must be certified to by the auditor of the State. In other words, that officer was to certify them before their execution was complete, so as to bind the public for their payment." *Anthony v. County of Jasper*, 101 U. S. 693, 25 L. Ed. 1005.

Antedating of bonds; execution by officer not such at time they bear date; noncompliance with law requiring registration and certification by state auditor; notice.

329. (Mo. 1879.) On February 10, 1872, Marion township, in Jasper county, Missouri, voted to subscribe \$75,000 to the capital stock of the M. C. & N. Railroad Company, upon certain conditions, under the Township Aid Act of Missouri. March 28, 1872, the County Court made such subscription on the terms and conditions specified. March 30, 1872, the legislature passed an act requiring all

bonds issued by counties to be registered by the auditor of State, and a certificate to be made by him indorsed on the bonds, to the effect that all the conditions and requirements of the law had been complied with in their issuance, etc. June 4, 1872, the County Court ordered that \$50,000 of the bonds should be issued and that the clerk have them registered according to law.

John Purcell was presiding justice of the County Court in March and until September, 1872, when he resigned, and R. S. Merwin was appointed in his place October 21, 1872. The bonds were executed by the clerk and Merwin in October, but were antedated as of March 28, 1872, and Merwin delivered them to a bank for the use of the contractor for the building of the railroad. They were not registered as required by the act of March 30, 1872. Neither the other justice nor the County Court, as a court, consented to what was done by Merwin, and the railroad company never complied with the conditions of the vote authorizing the issuing of the bonds. Held, that the county was not estopped from denying that the bonds were actually issued on the day they bear date; that as they were not registered as the law required, their execution was not complete, and that the holder was not entitled to the protection of the rule of the law merchant. Held, also, that the false date of the bonds was equivalent to a false signature and that the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. Held, also, that every person who deals with or through an agent of a municipal body, assumes all the risks of a lack of authority in the agent to do what he does, and that negotiable paper is no more protected against this inquiry than any other. *Town of Weyauwega v. Ayling*, 99 U. S. 112, 25 L. ed. 470, distinguished. *Anthony v. County of Jasper*, 101 U. S. 693, 25 L. Ed. 1005.

Bonds payable to a designated person or bearer.

330. (Ill. 1879.) Municipal bonds, under the laws of Illinois, made payable to bearer, may be transferred by delivery thereof, and an action may be maintained thereon in the name of the holder. *Roberts v. Bolles*, 101 U. S. 119, 25 L. Ed. 880; *Ottawa v. Na-*

tional Bank, 105 U. S. 342, 26 L. Ed. 1204.

Denomination of bonds.

331. (Ala. 1880.) Held, that the bonds involved in this case were not void, for the reason that they were not of the same denomination as those specified in the proposition of the railroad company for subscription submitted to be voted on, by the voters of the county. *County of Greene v. Daniels*, 102 U. S. 187; *County of Pickens v. Daniel*, 102 U. S. 187, 26 L. Ed. 99.

Any words importing negotiability sufficient.

332. (Tenn. 1880.) "In order to make a promissory note or other obligation, for the absolute payment of a sum certain, on a certain day, negotiable, it is not essential that it should in terms be payable to bearer or order. Any other equivalent expressions demonstrating the intention to make it negotiable will be of equal force and validity. The purpose of the plaintiff in error that the bonds on which the suit is brought should be negotiable is perfectly clear. They are payable to the railroad company or holder if the bond is transferred by the signature of the president of the company.

"This is equivalent to making the bonds payable to the company or order, provided the 'order' or indorsement is made by the president of the company. They bear his indorsement transferring them to bearer. They are in precisely the same plight as a promissory note payable to order and indorsed in blank, or to bearer, the title to which passes by mere delivery." *County of Wilson v. National Bank*, 103 U. S. 770, 26 L. Ed. 488.

Corporate seal not necessary.

333. (N. Y. 1881.) "It is apparent from the law, that the substantial thing authorized to be done on behalf of the town was to pledge the credit of the town in aid of the railroad company in the construction of its road, by subscribing to its capital stock, and issuing the obligations of the town in payment thereof. The technical form of the obligations was a matter of form rather than of substance. The issue of bonds under seal, as contradistinguished from bonds or obligations without a seal, was merely

a directory requirement. The town, indeed, had no seal; and the individual seals of the commissioners would have had no legal efficacy, for the bonds were not their obligations, but the obligations of the town; and their seals could have added nothing to the solemnity of the instruments." *Draper v. Springport*, 104 U. S. 501, 26 L. Ed. 812.

Bonds payable to a named person or bearer, indorsement not necessary.

334. (Ill. 1881.) It is not necessary to pass the legal title to municipal bonds and to authorize the transferee to sue thereon in his own name that an assignment or indorsement of the bonds be made thereon by the payee named therein, when they are also made payable to bearer. *Ottawa v. National Bank*, 105 U. S. 342, 26 L. Ed. 204.

United States revenue stamps not necessary on county bonds.

335. (Mo. 1881.) County bonds and coupons issued in the years 1870-1871, in payment of subscriptions to railroad companies, were admissible in evidence on a trial of an action against the county for the recovery of the amount due thereon, though not stamped as obligations for the payment of money under the provisions of the internal revenue laws of the United States in force at the time of their issue. *County of Ralls v. Douglass*, 105 U. S. 728, 26 L. Ed. 975.

Certificate of auditor of state on bonds under Kansas statute.

336. (Kan. 1881.) Its effect and force discussed at some length and in this case held to be conclusive as to the validity of the bonds. Under the circumstances of this case, the county issuing the bonds was held to be estopped by the certificate of registration of the auditor of State. *Lewis v. Comrs.*, 105 U. S. 739, 26 L. Ed. 993.

What officers shall issue bonds.

337. (Ill. 1882.) Bonds of the county of Kankakee, in Illinois, were properly executed and issued by the board of supervisors of the county and not by the County Court, as that county was organized under the Township Organization Law. *County of Kankakee v. Aetna Life Ins. Co.*, 106 U. S. 668, 2 Sup. Ct. Rep. 80, 27 L. Ed. 309.

Reformation of bonds having no seals affixed.

338. (N. J. 1883.) See digest of this case in chapter XII. *Bernards Township v. Stebbins*; *Same v. Morrison*, 109 U. S. 341, 3 Sup. Ct. Rep. 252, 27 L. Ed. 956.

Statutory requirements as to execution of bonds.

339. (Kan. 1884.) A statute of Kansas directed that railroad-aid bonds, issued by direction of county commissioners of a county on behalf on townships of such county, should "Be signed by the chairman of the board and attested by the clerk under the seal of the county." Held, that bonds issued under such law, not so attested and sealed by the county clerk, were invalid, that his signature was necessary to the validity of the bonds, notwithstanding he had no discretion in the matter.

No estoppel by recitals if bonds not executed according to law.

When bonds issued by county commissioners on behalf of townships of the county are invalid on account of defects in their execution, recitals contained in the bonds, importing compliance with law, will not estop the township from contesting their validity. *Bissell v. Spring Valley Township*, 110 U. S. 162, 3 Sup. Ct. Rep. 555, 28 L. Ed. 105.

Registration of bonds by public officers.

340. (Kan. 1884.) A statute of Kansas required the auditor of State to register bonds presented to him for that purpose and to notify the officers issuing them of such registration, which fact shall be entered by such officers in a book kept by them for that purpose; and provided, that "Such bonds shall thereafter be considered registered bonds." Held, that the State auditor's certificate of registration of bonds in his office did not estop the body issuing the bonds from disputing their validity, as such registration by the auditor was not the complete registration required by the law. *Lewis v. Commissioners*, 105 U. S. 739, 26 L. Ed. 993, distinguished. *Bissell v. Spring Valley Township*, 110 U. S. 162, 3 Sup. Ct. Rep. 555, 28 L. Ed. 105.

Certificate by state officers of issue of bonds "pursuant to law;" "regularly and legally issued;" registration; not conclusive.

341. (Nebr. 1884.) A certificate of the secretary of state and auditor of State of Nebraska, upon bonds issued to aid in the construction of a railroad, that they were issued "pursuant to law," and the further certificate of the auditor "that upon the basis of data filed in my office, it appears that the attached bond has been regularly and legally issued by the county of Dixon to C. C. & B. H. Railroad Company, and said bond, upon presentation thereof by said company, has this day been duly registered in my office in accordance with the provisions of an act, entitled 'An act to authorize the registration, collection, and redemption of county bonds, approved February 25, 1875.'" Held, of no conclusive effect as to the validity of the bonds. *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315, 28 L. Ed. 360.

Negotiability not affected by option to pay before due.

342. (Iowa, 1885.) Bonds of a school district, made payable to named persons or their order, upon being indorsed in blank by the original payees, are negotiable by the law merchant and under the statutes of Iowa, and title passes by mere delivery precisely as it would had they been made payable to a named person or bearer, notwithstanding they are made "payable at the pleasure of the district at any time before due." *Ackley School District v. Hall*, 113 U. S. 135, 5 Sup. Ct. Rep. 371, 28 L. Ed. 954.

Reciting repealed act; compliance with existing act.

343. (Kan. 1885.) The recital in bonds of a repealed statute as authority for their issuance, when the repealing act conferred such authority, will not invalidate the bonds, when it also appears from statements in the bonds that the terms of the existing act had been complied with. *Anderson County Comrs. v. Beal*, 113 U. S. 227, 5 Sup. Ct. Rep. 433, 28 L. Ed. 966.

Purchasers take risk of official character and genuineness of signatures of officers.

344. (N. Y. 1885.) The rule in *Anthony v. Jasper County*, 101 U. S.

693, reaffirmed, that "purchasers of municipal securities must always take the risk of the genuineness of the official signature of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the official character of him who makes it." *Merchants' Bank v. Bergen County*, 115 U. S. 384, 6 Sup. Ct. Rep. 88, 29 L. Ed. 430.

Registration and certification by state auditor of bonds not authorized to be registered.

345. (Kan. 1886.) Bonds issued by Oxford township, in Kansas, showed upon their face that the requirements of the special act of March 1, 1872, by authority of which they appeared to have been issued, had not been complied with. Held, in an action on the bonds by a holder for value, that a certificate of the auditor of the State, indorsed on the bonds, that they have "been regularly and legally issued; that the signatures thereto are genuine, and that such bond has been duly registered" in his office, in accordance with the general act of March 2, 1872, giving its title, did not aid the plaintiff.

"The bonds on their face excluded the possibility of their having been issued under the act of March 2, 1872; and as the public records showed that the proceedings were not taken under that act, and as the auditor was authorized by section 14 of that act only to register bonds issued under that act, and as those bonds did not fall within the purview of bonds authorized to be registered by him under section 15 of that act, it follows that the auditor had no right to decide, as matter of law, that the bonds were bonds of the kind which he was authorized by the act of March 2, 1872, to register and certify, when, as a matter of law, they were not." *Crow v. Oxford*, 119 U. S. 215, 7 Sup. Ct. Rep. 180, 30 L. Ed. 388.

Place of payment of bonds.

346. (Ill. 1887.) "As the statute which gave the authority to issue the bonds is silent as to the place of their payment, we are at a loss to see how the place named therein can have the effect supposed. Council admit in argument that it does not render the bonds void, but insist that the town had no power to make them payable at any other place than the office of

the town treasurer." *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. Rep. 358, 30 L. Ed. 523.

Noncompliance with mandatory provisions of statute; registration by state auditor does not aid.

347. (Ill. 1888.) Registration of bonds by State auditor, under the provisions of an act authorizing such registration, will not validate such bonds, even in the hands of a bona fide holder, when mandatory requirements of such statute with reference to the performance of conditions precedent to the issue of the bonds have not been complied with. *German Savings Bank v. Franklin County*, 128 U. S. 526, 9 Sup. Ct. Rep. 159, 32 L. Ed. 519.

Bonds signed by person not in office at time of signing.

348. (Tex. 1889.) Bonds of the city of Cleburne, Texas, bearing date January 1, 1884, were signed and issued July 3, 1884. They were signed on the latter date by one Hodge, as mayor of the city. Hodge was mayor on January 1, 1884, but was not such officer when he signed the bonds. The statute required that the bonds be signed by the mayor of the city. Held, that the bonds were invalid.

"Article 422 of the statute provides that the bonds shall be signed by the mayor. This clearly means that they shall be signed by the person who is mayor of the city when they are signed, and not by any other person. The legislature having declared who shall sign them, it was not open to the city council to provide that they should be signed by some other person. Article 423 of the statute provides that it shall be the duty of the mayor, whenever any bonds are issued, to forward them to the comptroller of public accounts of the State, for registry. They could not be issued until they were properly signed by a person who was the mayor at the time they were signed, and the comptroller could receive them lawfully for registry only from such mayor. So, also, by article 424, it is made the duty of the same mayor, and not that of any other person, at the time of forwarding the bonds to the comptroller for registration, to furnish him with the statements specified in that article. No other person than such mayor could furnish the comptroller with such statement."

"But we have always held that even bona fide purchasers of municipal bonds must take the risk of the official character of those who execute them. An examination of the records of the city in regard to the issuing of the bonds would have disclosed the fact that the bonds had not been signed and issued under the ordinance of September 13, 1883, until July 3, 1884, that W. N. Hodge was not mayor on that day; and that the person who then signed the bonds as mayor was a private citizen." *Anthony v. County of Jasper*, 101 U. S. 693, and other cases noticed and distinguished. *Coler v. Cleburne*, 131 U. S. 162, 9 Sup. Ct. Rep. 720, 33 L. Ed. 146.

Sufficiency of recitals in bonds.

349. (Kan. 1890.) It was urged that the recitals contained in bridge bonds were not sufficient under the law requiring the purpose of their issue to be stated, because the particular bridge for which the bonds were issued was not specified. Held, that the recital was sufficient. "It has never been held by this court, and ought not to be, that a full and minute detail of all the proceedings is essential to the validity of a recital. The main thing is that the county has promised to pay, and that the people by their vote have authorized such a promise for one of the purposes for which, under the statute, they may bind themselves."

Sufficiency of recitals.

Courthouse bonds issued by Comanche county recited that they were "Executed and issued for the purpose of erecting county buildings, in pursuance of and in accordance with" an act of the legislature. The statute authorized county commissioners to borrow money for the erection of county buildings. Held, "There is no force in the suggestion that the purpose expressed in the recital is that of erecting county buildings instead of borrowing money for the erection of county buildings. A general statement of the purpose, with direct reference to the act granting authority, and a recital that the bond is issued in pursuance of and in accordance with the act, is sufficient." *Comanche County v. Lewis*, 133 U. S. 198, 10 Sup. Ct. Rep. 286, 33 L. Ed. 604.

Officers designated by legislature may issue bonds and bind township, though not regular township officers.

350. (N. J. 1890.) "It is urged that these commissioners were not elected by the people; that they were not the general officers of the township, but were special officers appointed by the Circuit Court — special agents, as it were, for the specific purpose; that the statute does not in terms give them authority to determine whether the preliminary conditions have been complied with; and that this case is therefore to be distinguished in these respects from those cases where similar recitals have been held conclusive. But though not the ordinary officers of the township, they were the ones to whom, by legislative direction, was given full authority in the matter of issuing bonds. The organization of townships, the number, character, and duties of their various officers are matters of legislative control; and it is not doubtful that officers appointed represent the municipality as fully as officers elected. When the legislature has declared how an officer is to be selected, and the officer is selected in accordance with that declaration, his acts, within the scope of the powers given him by the legislature, bind the municipality." *Bernards Township v. Morrison*, 133 U. S. 523, 10 Sup. Ct. Rep. 333, 33 L. Ed. 766.

Recital on bond of purpose of issue; charter requirement; noncompliance with; recital of ordinance.

351. (Tex. 1892.) "This case involves the single question, whether a requirement of a charter that the bonds issued by a municipal corporation shall specify for what purpose they are issued is so far satisfied by a bond which purports on its face to be issued by virtue of an ordinance, the date of which is given, but not its title or its contents, as to cut off defenses which might otherwise be made. We are of the opinion that it is not."

"It is certainly a reasonable requirement that the bonds issued shall they were issued without any purpose for which they were issued. In any event, it was a requirement of which the purchaser was bound to take notice, and if it appeared upon their face that they were issued for an illegal purpose they would be void. If

express upon their face the purpose appearing at all upon their face, the purchaser took the risk of their being issued for an illegal purpose, and, if that proved to be the case, they were as void in his hands as if he had received them with express notice of their illegality. Ordinarily the recital of the fact that the bonds were issued in pursuance of a certain ordinance would be notice that they were issued for a purpose specified in such ordinance (*Hackett v. Ottawa*, 99 U. S. 86, 25 L. Ed. 363), and the city would be estopped to show the fact to be otherwise. *Ottawa v. National Bank*, 105 U. S. 342, 26 L. Ed. 1204. But where the statute requires such purpose to be stated upon the face of the bonds, it is no answer to say that the ordinance authorized them for a legal purpose, if in fact they were issued without consideration, and for a different purpose." *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. Rep. 819, 36 L. Ed. 652.

Under what law issued; effect of recitals.

352. (Mo. 1893.) "While the bonds on their face recite that they are 'issued under and pursuant to order of the County Court of Knox county, for subscription to the stock of the Missouri & Mississippi Railroad Company, as authorized by an act of the general assembly of the State of Missouri, entitled 'An act to incorporate the Missouri & Mississippi Railroad Company,' approved February 20, 1865, and while such a recital may be invoked by the holder of the bonds as an estoppel against the county, it is not conclusive in its favor as to the act under which the bonds were in fact issued.'" *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. Rep. 267, 37 L. Ed. 93.

Error in copying title of act in bond; misrecital of corporate name of obligor.

353. (Kan. 1893.) Bonds were issued by the board of education of the city of Atchison, Kansas, purporting to have been issued under authority of an act, entitled "An act to organize cities," etc., approved February 28, 1868. Held, that the erroneous use of the word "organize," in place of the word "incorporate," in copying the title of the act in the bond, did not invalidate the bonds.

Referring to this objection the court say: "This is trifling. There was an act giving authority to the board of education to borrow money and issue bonds, and whose title was exactly as described in this bond, except in place of the word 'organize' the word 'incorporate' was used. Falsa demonstratio non nocet. *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110. An error in copying into an instrument a single word in the title of a statute does not vitiate the deliberate acts of the proper officers of a municipality as expressed in the promise to pay, which they have issued for money borrowed." Held, also, that the misrecital of the proper corporate name of the obligor, would not vitiate the obligations. *Atchison Board of Education v. De Kay*, 148 U. S. 591, 13 Sup. Ct. Rep. 706, 37 L. Ed. 573.

Coupons for installments of principal.

354. (Kan. 1892.) A statute of Kansas authorizing the issuance of township bonds contained the provision: "And to the said bonds shall be attached coupons for annual installments of the principal and interest accruing from time to time by the terms of said bonds." Held, that said provision, taken in connection with other provisions of such statute, did not require that bonds issued under said act should have attached coupons for installments of principal. *Township of Washington v. Coler et al.*, 2 C. C. A. 272, 51 Fed. 362.

Construction of statutory requirement as to contents of bonds.

355. (Mich. 1893.) The bonds in this case recited that they were issued "For the purpose of extending the time of payment of bonds formerly issued by said city." Held, that this was a substantial compliance with the legal requirement that "Each bond shall show upon its face the class of indebtedness to which it belongs, and from what fund it is payable."

"Does section 2717, above set out, require that a refunding bond shall show the class of indebtedness to which the original bond belonged? Bonds of many kinds might mature at the same time. Was it the purpose of this statute to trace each separate old bond into a new and distinct refunding bond? There might be grave difficulties in preserving such identity. To get at the meaning of this provision,

we must look to certain other sections of the same chapter." *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. Rep. 819, 36 L. Ed. 652, distinguished. *City of Cadillac v. Woonsocket Inst. for Savings*, 7 C. C. A. 574, 58 Fed. 935.

Time of maturity of bonds.

356. (Kan. 1894.) Bonds issued and made payable "in twenty years after date," comply, in that respect, with the requirements of law, that bonds shall be payable "in not less than ten years nor more than twenty years from the date of their issue." *City of Alma v. Guaranty Savings Bank*, 8 C. C. A. 564, 60 Fed. 203.

Form of bonds, when not material.

357. (Mich. 1895.) The bonds did not state upon their face the class of indebtedness to which they belonged, as the law required.

"Such a defect might be quite material in considering the liability of a city to a bona fide purchaser for value, who relied on the apparent validity of the bond under the law to escape equitable defenses of the obligor, but here there is no defense to the debt which the bond evidences, and a technical compliance with the law in the form of the instrument becomes immaterial." *City of Gladstone v. Throop*, 18 C. C. A. 61, 71 Fed. 341.

Valid and invalid act recited in bond.

358. (Ind. 1896.) When there is a valid and invalid act, each in terms authorizing the issuance of bonds by a city on different terms and conditions, recitals in bonds issued by such city of their issuance, in pursuance of the invalid as well as the valid act, will not prejudice the rights of a bona fide holder; he might properly assume that both the valid and invalid act had been complied with. *Evansville v. Dennett*, 161 U. S. 135, distinguished. *Evansville v. Dennett*, 20 C. C. A. 142, 73 Fed. 966.

Antedating of bonds; execution by persons not officers at time of such execution; notice of, in records; bonds held void.

359. (Cal. 1897.) Bonds were issued by the city of San Diego, bearing date of January 1, 1873, under and in pursuance of ordinances and a resolution theretofore passed, and purporting to be "in conformity with an act of the legislature of the State

of California, entitled 'An act to re-incorporate the city of San Diego,' approved March 7, 1872," but were not in fact issued until 1877, after the legislature of the State had passed an act, approved April 1, 1876, to re-incorporate the city of San Diego and provide another charter for it, which act repealed the act of March 7, 1872. The bonds when issued were signed by persons not officers of the city in 1873. Held, that they were issued without authority of law and were void even in the hands of bona fide holders.

"In the light of the facts disclosed by the record, it is manifest that the officers who signed the bonds acted without authority of law. It is well settled that bona fide purchasers of municipal bonds must take the risk of the official character of those who execute them. An examination of the records of the board of trustees of the city of San Diego would have disclosed the fact that the officers of the board who signed the bonds bearing date January 1, 1873, were not officers of the board at that date, and would have discovered the fact that the bonds were antedated after the act of 1872 had been repealed." *Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005, and *Coler v. Cleburne*, 131 U. S. 162, 9 Sup. Ct. Rep. 720, 33 L. Ed. 146, commented on and followed. *Lehman v. City of San Diego*, 27 C. C. A. 668, 83 Fed. 669.

Statutory requirement as to period bonds may run.

360. (Minn. 1892.) "It is finally urged that the bonds were void upon their face, because they did not mature for more than thirty years after they were executed, and for that reason were not authorized by section 18 of the act of April 23, 1891. The fact is, however, that the bonds did not begin to bear interest until June 1, 1894, and they were payable on that day thirty years thereafter. This was a substantial compliance with the law, as has several times been held, and the bonds were not void, nor the validity thereof in any wise affected, for the reason last assigned." *City of South St. Paul v. Lamrecht Bros. Co.*, 31 C. C. A. 585, 88 Fed. 449.

Seal unnecessary to the validity of bonds under Michigan law.

361. (Mich. 1890.) "The officers issuing evidences of township indebted-

ness, purporting to comply with the statute of 1867, must therefore be presumed to have intended to issue sealed instruments. They have not done so in this case. But section 7778 of Howell's Annotated Statutes of Michigan, part of which has already been quoted, provides further, that no bond, deed of conveyance, or other contract in writing, signed by any party, his agent or attorney, shall be deemed invalid for want of a seal or scroll affixed thereto by such party. In *Jerome v. Ortman*, 66 Mich. 668, 33 N. W. 759, it was held that an action of covenant in Michigan, as at common law, was an action upon a deed; that the purpose of the clause of section 7778, just quoted, was to permit parties intending to make a deed or specialty to have the writing signed by them, though without seal, treated in law as a deed or specialty; and therefore that covenant might be maintained thereon. See also *McKinney v. Miller*, 19 Mich. 142. We think the case at bar is within *Jerome v. Ortman*. The officers signing the instruments here in suit intended them to be bonds (i. e., deeds), for the statute so denominates the securities to be issued, and the instruments themselves bear the name 'bond' on their face; and therefore they may be given effect as such, and will support an action of covenant." *Rondot v. Rogers Township*, 39 C. C. A. 462, 99 Fed. 202.

Statement on face of bond of purpose of issue; statutory requirement; what satisfies; statement of ordinance authorizing issue; recital of date of passage sufficient.

362 (Ohio, 1900.) "The Ohio statute (Rev. Stat., § 2703) requires that 'all bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued, and under what ordinance.' Among other 'purposes' for which bonds were authorized by that chapter is that specified by section 2701, where they are authorized to be issued 'for the purpose of extending the term of the payment of any indebtedness incurred which,' etc. Other sections of the chapter provide for the issuing of original bonds for various purposes." Held, that such a statement of the purpose in such refunding bonds was

a compliance with the requirement of the law, and that it was unnecessary "to go beyond the immediate purpose and recite the character of the original indebtedness for which the refunded bonds were issued."

"Section 2703 of the Ohio statutes, above referred to, contains a requirement * * * that 'all bonds issued under the authority of this chapter shall express * * * under what ordinance they were issued.' This requirement is also fully met by the recital in the bonds that they were issued under the authority of 'an ordinance passed by the village council February 15, A. D. 1892.'" *Village of Kent v. Dana*, 40 C. C. A. 281, 100 Fed. 56.

Bonds payable to "_____ or order."

363. (Iowa, 1900.) "A bond or note of a corporation payable to '_____ or order' is, in legal effect, payable to the holder or bearer. It has every attribute of that class of commercial paper which the bearer may enforce in the Federal courts without proof that his assignor could have done so, and he may maintain an action upon it whether his assignor could have done so or not." *Lyon county, Iowa, v. Keene Five-Cent Sav. Bank of Keene, N. H., et al.*, 40 C. C. A. 391, 100 Fed. 337.

Time of payment of bonds; certainty: payable at option of county after certain time; negotiability not affected thereby.

364. (S. Dak. 1900.) The negotiability of municipal bonds under the law merchant is not affected by their being made payable on the 11th day of July, A. D. 1911, or at any time after the 6th day of July, 1901, at the option of the county.

Registration of bonds; certificate of issue "in pursuance" of law; effect of.

A recital in county bonds that they were issued in pursuance of a certain act, which required them to be registered in a designated county office, is a certificate that they were registered in the proper office. *Hughes County, S. Dak., v. Livingston*, 43 C. C. A. 541, 104 Fed. 306.

Directory requirements of statute as to form and contents; omission of date, name of payee, etc.; erroneous recital of statute.

365. (N. Y. 1900.) Bonds were issued by the town of Gravesend under an act of the legislature of New York, which authorized either coupon or registered bonds, or coupon bonds registered as to the principal only, to be signed by the supervisor and countersigned by the treasurer of the town, and, if registered, to be made payable to the person to whom issued, the place of registration to be fixed in the bonds by the officers registering the same, and to have a certificate indorsed thereon showing the registration, and when sold by the payee they might be registered in the name of the new purchaser.

The bonds so issued purported to be registered bonds, but they were not dated and did not contain any designation of the place of registration, were made payable in blank and were indorsed on the back, "This bond is registered in town treasurer's office, Gravesend." It was objected that these departures from the prescribed form invalidated the bonds, but the court held that the bonds were not invalid for such departures.

"It was obviously the intention of the statute that the bonds to be created should be negotiable. As it authorized the creation of coupon bonds at the discretion of the supervisor, which were not to be registered, even as to the principal sum, it is manifest that the provisions in respect to registration, in respect to the name of the payee, and in respect to all matters merely of form and phraseology, were not designed as limitations of his authority, or to protect the town against his abuse of his functions. They were formalities which could not subserve any essential purpose, except to assure purchasers that they were buying bonds which were literally perfect. If purchasers were willing to accept registered bonds which were not, as to particulars, devised for their interests or convenience, in strict conformity with these provisions, the town could not be harmed. The provisions should therefore be considered as directory, and not mandatory, and, in the absence of any language in the act importing that noncompliance would invalidate

the bonds, any departure in respect to them should not be deemed a defect of substance."

A number of cases bearing upon this point noticed and commented upon by the court.

Erroneous recital of enabling act.

"The objection that the bonds erroneously recited the statute under which they purported to be issued is as untenable as the others which have been considered. If there had been no recital whatever, the validity of the bonds would not have been affected by the omission. A recital is valuable as affording the basis of an estoppel when it is alleged by the municipality that conditions precedent to the exercise of the power of creating bonds, prescribed by statute, have not been complied with, but otherwise it is of no significance. The erroneous recital was innocuous." *D'Esterre v. City of New York et al.*, 44 C. C. A. 75, 104 Fed. 605.

Noncompliance with statutory requirement; insufficient recital on face of bond of ordinance under which issued; notice.

366. (Ohio, 1900.) Refunding bonds were issued by the village of Mineral Ridge, Ohio, purporting to have been issued by authority of section 2701, Revised Statutes of Ohio, and containing a recital that they were issued to take up former bonds, etc., "as provided in the ordinance of said village." Held, that such reference to the ordinance was not a compliance with the requirements of section 2703 of the Revised Statutes of Ohio, that all bonds issued under the provisions of that chapter "shall express upon their face the purpose for which they were issued and under what ordinance" *Village of Kent v. Dana*, 40 C. C. A. 281, 100 Fed. 56, distinguished. *United States Trust Co. v. Village of Mineral Ridge*, 44 C. C. A. 218, 104 Fed. 851.

Term and maturity of bonds; date; time of issue controls.

367. (Kan. 1900.) An objection to bonds was that they ran for a longer period than that specified in the petition presented to the township board asking for the election.

"The recitals in the bonds are a complete answer to this objection.

Moreover, it is shown to be without foundation in fact by the special finding of facts. The bonds were to run ten years. They were payable on the 1st day of July, 1897, and, though they bear date the 1st day of June, 1887, the court finds they were not issued until the 20th day of July, 1887, so that they matured in a little less than ten years from the date from which to compute the time they had to run. They became binding obligations on the township from the date of their issue only." *Syracuse Township, Hamilton County, Kan., v. Rolins*, 44 C. C. A. 277, 104 Fed. 958.

Place of payment of bonds.

368. (Iowa, 1901.) It was held to be an immaterial deviation, that bonds were made payable at the office of Weare & Allison, in Sioux City, Iowa, instead of at the office of the treasurer of the county as the law directed, both being within the same county. *Independent School District v. Rew*, 111 Fed. 1, 49 C. C. A. 198.

Two statutes held to be cumulative; compliance with one statute only.

369. (Ky. 1903.) Bonds were issued importing compliance with first act only. Held, that holders of the bonds were not entitled to the benefit of provisions of second act. *Hubbert v. Campbellsville Lumber Co.*, 191 U. S. 70, 24 Sup. Ct. Rep. 28, — L. Ed. —.

Recital of invalid act will not invalidate bond, when.

371. (N. Car. 1902.) "The recital of the invalid enactment of March 3, 1887, however, does not invalidate the bonds, if there was in force at the time the bonds were issued other valid legislation which gave power to Stanley county to issue them." *Board of Comrs. of Stanley Co. v. Coler*, 51 C. C. A. 379, 113 Fed. 705. See, also, *Board of Comrs. of Wilkes Co. v. Coler*, 51 C. C. A. 399, 113 Fed. 725.

When bonds are, "issued." Definition of term.

372. (Neb. 1902.) "The meaning of this term in statutes of this character was considered with some care by this court in *Corning v. Board*, 42 C. C. A. 154, 102 Fed. 57; and the conclusion was there reached that, in the absence of other definition, it must be given its usual significance to persons of ordinary intelligence, and that that significance was to send forth; to emit. The bonds in this case were in the absolute control of the county commissioners, in the hands of the fiscal agency of the county, in the city of New York until they executed the certificates that the requisite amount of work had been done to entitle the irrigation company to receive them. The company could not obtain them or apply them to any use until it first obtained these certificates from the board of county commissioners. The bonds, therefore, were neither actually nor legally issued until the commissioners certified that the work had been done, and upon the presentation of those certificates the fiscal agency delivered the bonds to the company." *Perkins County v. Graff*, 52 C. C. A. 243, 114 Fed. 441.

Time of payment of bonds; when statute mandatory.

373. (Kan. 1902.) The enabling statute provided that the bonds should be payable in twenty years from their date.

"As the township had the power to call in and pay the bonds after the lapse of ten years, we perceive no reason why it might not, in the first instance, make them payable on January 1, 1907, instead of March 15th of that year. By making them payable at that time, instead of two and one-half months later, it complied substantially with the provisions of the statute. Moreover, since the provision relative to the time of payment was directory in its character, and did not go to the essence of the power to issue, the failure to comply there-

with strictly did not render the bonds void, as has several times been decided. *Rock Creek Tp. v. Strong*, 98 U. S. 271, 277, 24 L. Ed. 815; *City of South St. Paul v. Lamprecht Bros. Co.*, 31 C. C. A. 583, 590, 88 Fed. 449; *Dows v. Town of Elmwood (C. C.)*, 34 Fed. 114, 117. The proposition, therefore, that the bonds were void because they ran for a period which was a little less than twenty years, is, in our judgment, untenable." *Board of Commissioners v. Vandriess*, 53 C. C. A. 192, 115 Fed. 866.

Township bonds signed by township trustee and attested by clerk.

374. (Kan. 1902.) A statute authorized the township board to issue bonds. The board consisted of a township trustee, a township clerk and a township treasurer. Held, that in the absence of any specific direction in the statute, bonds signed by the township trustee and attested by the township clerk were properly executed. *Board of Commissioners v. Vandriess*, 53 C. C. A. 192, 115 Fed. 866.

Bonds bore date same as publication of enabling act.

375. (Kan. 1902.) It was urged that the bonds were invalid for the reason that the act did not take effect until the day after its publication.

"This contention appears to be based on the theory that the act was not operative until March 13, 1887—the day succeeding its publication. But it is a general rule that, where a computation is to be made from an act done, the day on which it is done is to be included; and, in accordance with that rule, it has been held on several occasions that a legislative act, when nothing is said to the contrary, takes effect on the day of its passage or approval, and is to be regarded as in effect during the whole of that day, except in those cases where the law takes notice of fractions of a day, and gives effect to an act from the hour it was actually passed or ap-

proved, as it always will do when it becomes necessary to decide upon conflicting interests and accomplish the ends of justice." *Board of Commissioners v. Vandriess*, 53 C. C. A. 192, 115 Fed. 866.

Time bonds may run.

376. (Neb. 1902.) A provision in an enabling act requiring the annual levy and collection of a tax of five per cent. of the bonds as a sinking fund for their redemption, in addition to the interest does not impliedly limit the time the bonds may run to twenty years.

Statement of purpose of issue:

The enabling statute required the bonds to state "for what purpose issued." In the caption of the bonds appeared these words: "Ogalalla Precinct Canal Bond" and each interest coupon recited that it represented the annual interest on bond No. — of said precinct, issued August 1, 1889, "to aid in the construction of a canal west of the town of Ogalalla."

Held, that this was a sufficient compliance with the requirement. *Kieth County v. Citizens Savings & Loan Assn.*, 53 C. C. A. 525, 116 Fed. 13.

Recitals in bonds of wrong act.

377. (Neb. 1902.) "There was ample authority here for the city of Beatrice to issue these bonds, and the fact that the recitals in them referred to other statutes was not material. If there was any law which authorized the mayor and council to issue the bonds and coupons, they were valid, and the recitals that they were emitted by virtue of other statutes which gave no such authority could not divest the municipality and its officers of the power with which the legislature had endowed them, nor invalidate their lawful exercise of that power. *Commissioners v. January*, 94 U. S. 202, 206, 24 L. Ed. 110; *Ninth Nat. Bank v. Knox Co. (C. C.)*, 37 Fed. 73, 79; *Board v. De Kay*, 148 U. S. 591, 595, 596, 13 Sup. Ct. 706, 37 L. Ed. 573;

Knox Co. v. Ninth Nat. Bank, 147 U. S. 91, 95, 13 Sup. Ct. 267, 37 L. Ed. 93." City of Beatrice v. Edminson, 54 C. C. A. 601, 117 Fed. 427.

Affixing official seal of city clerk to city bonds instead of corporate seal of city.

378. (Ohio, 1903.) The statutes of Ohio provide that all bonds issued by municipal corporations shall be signed by the mayor and clerk, and be sealed with the seal of the corporation. The ordinance providing for the issue of these bonds contained a similar provision. Both before and after these bonds were issued the mayor and clerk used the clerk's seal as the corporate seal in signing and sealing certain municipal bonds. Bonds of five or six different series, all sealed with the clerk's seal and signed by the mayor and clerk, were issued from 1884 to 1893, and were subsequently paid and cancelled without any question of their legality. We are satisfied that when the mayor and clerk placed the clerk's seal on these bonds in the space provided for the corporate seal, and affixed their signatures, attesting that the city of Defiance had thus caused its corporate name and seal to be set by the mayor and clerk, they intended to use the clerk's seal as the corporate seal. If the seal affixed was not the corporate seal, there was a mistake made which a court of equity should correct. The decree of the court below in the equity case was entirely proper under the circumstances. *Bernards Tp. v. Stebbins*, 109 U. S. 341, 3 Sup. Ct. 252, 27 L. Ed. 956."

Recital of unconstitutional act, will not invalidate bonds, when.

"It is well settled that the recital of an unconstitutional act as authority for issuing bonds will not invalidate them in the hands of an innocent holder if power for the issue can be found elsewhere (*St. Paul v. Lamprecht Bros*, 31 C. C. A. 585, 88 Fed. 450; *City of Beatrice v. Edminson*, 54

C. C. A. 601, 117 Fed. 427; *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760; *Waite v. Santa Cruz*, 184 U. S. 304, 22 Sup. Ct. 327, 46 L. Ed. 552); and it is equally well established by these and many other cases that a general recital that all the things required by law to be done have been done, is ample to estop a city from setting up any lack of regularity in issuing the bonds, whether by failure to comply with conditions precedent or otherwise. If an examination of the law shows the power exists, no investigation of the record to ascertain whether the conditions precedent to its exercise have been complied with is required in the face of such a recital.

"In view of all this, we think these representations were sufficient to induce a purchaser to believe, if a submission to the voters under the general law was necessary to validate the special act and lawfully exercise powers under it, that such submission was had, or, if the special act was of doubtful constitutionality, that the bonds were issued in compliance with the provisions of the general law, after the necessary submission to the electors and approval by them. By first submitting the question to the voters, the bonds might have been issued under both the special act and the general law, and the recitals imply this was done. There was nothing on the face of the bonds to put the purchaser upon notice of any illegal purpose in issuing them." *City of Defiance v. Schmidt*, 59 C. C. A. 159, 123 Fed. 1.

Date of bonds and time of issuance distinguished.

379. (Colo. 1905.) "It is to be observed that the contention of the plaintiff in error is predicated upon the assumption that the date of the bonds was the time of their issue, and that a designation of the places for posting and a posting of the ordinance after the bonds were issued could serve no lawful purpose. But

there is no presumption that the date of the bonds is the date of their actual emission or issue. It is the common practice to fix an arbitrary date for municipal bonds, and their issue on the day of their date is of exceptional occurrence. It is common knowledge that the 1st day of July is one of the conventional days for the dating of bonds, and, moreover, it appears from the very ordinance before us that that date was arbitrarily selected in advance, without regard to the exact time of the consummation of the transaction by the delivery of the bonds." *Town of Fletcher v. Hickman*, 136 Fed. 568, 60 C. C. A. 350.

Bonds dated December 30, 1890, with name of then clerk on coupons, sold eighteen months after, bonds when sold signed by another who was then clerk.

380. (Cal. 1905.) Action at law on interest coupons of bonds of an irrigation district.

"The law is well settled that bona fide purchasers of municipal bonds take with notice of the law under which such bonds are issued. The plaintiff in error must therefore be held to have known of the provisions of the act called the 'Wright Act.'"

"If it be conceded that certain of the foregoing statutory provisions may be regarded as merely directory, such as that 'the seal of the board of directors shall be affixed' to the bonds, that they 'shall be numbered consecutively as issued,' and that the coupons attached to the bonds shall be 'signed by the secretary,' still there is no ground whatever for holding that the signatures of the officers designated by the statute, and which it declares shall be affixed to the bonds which constitute the principal obligation, are not essential to their execution. And this is not only not disputed, but is virtually admitted, in the reply brief for the plaintiff in error. At all events, the decision of the Supreme Court in the case of *Anthony v. County of Jasper*, 101 U. S. 693, 25 L. Ed. 1005, is conclusive upon that proposition."

"Accepting the contention of the plaintiff in error as correct, and treating the bonds to which the coupons sued upon in the present case were originally attached as having been issued the day they bear date, to wit, December 30, 1890—the day they were directed to be issued by the board of directors of the district—the difficulty in the way of sustaining them is that they were not signed by the then secretary, who was Van Arsdale. His lithographed signature was affixed to the coupons attached to the bonds, but he never signed the bonds, which, as has been said, was the principal obligation, and which the statute declares should be signed by the president and secretary of the board of directors of the district. The bonds in question were subsequently, and nearly two years after December 30, 1890, signed by McCully, as secretary, who had then succeeded Van Arsdale in that capacity; and with McCully's signature affixed to the bonds and Van Arsdale's lithographed signature affixed to the coupons attached thereto they were disposed of for value. Each bond, with the annexed coupons, constituted but one instrument; the bond being the principal obligation and the coupons merely incidental. *City of Kenosha v. Lamson*, 9 Wall. 477, 19 L. Ed. 725. As was said by the court below, both Van Arsdale and McCully could not be secretary at one and the same time, and each bond therefore showed upon its face that there was something wrong about it. As said by the Supreme Court in the case of *Anthony v. County of Jasper*, supra:

'Purchasers of municipal securities must always take the risk of the genuineness of the official signatures of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the official character of him who makes it.'

"Proper inquiry by the purchaser would have disclosed to him that McCully was not the secretary of the

board of directors on December 30, 1890; and therefore, treating the bonds in question as having been then issued, as is contended by the plaintiff in error should be done, they were void and of no effect, because not signed by the secretary, as required by section 15 of the Wright act. On the other hand, treating the bonds as having been issued at the time of their disposal, and when McCully was in fact secretary, they equally failed to conform to those other essential provisions of the statute declaring that they shall bear date at the time of their issue, and be payable in installments at the various times therein fixed. In that view they are ante-dated, the direct and necessary effect of which is to make them payable within a shorter time than is provided by the statute for their payment, which provision is, as a matter of course, of the essence of the law, and not a matter of mere form. In either event, and in both cases, the purchaser was apprised by the face of the bond itself and the law under which it purported to be issued of its invalidity." *Wright v. East Riverside Irr. Dist.*, 70 C. C. A. 603, 138 Fed. 313.

In this case there was a carefully prepared dissenting opinion in which a number of decisions are reviewed.

Bonds not registered when registration required by law nonenforceable in action at law. Equitable remedy. Laches.

381. (Neb. 1905.) "That the bonds in question are unenforceable at law is not debatable. The Constitution above quoted expressly declares that 'no bonds or evidences of indebtedness so issued shall be valid unless the same shall have endorsed thereon a certificate signed by the secretary and auditor of state showing that the same is issued pursuant to law.' The act of the legislature required the auditor to examine the statement and bonds submitted to him for registration, and, if satisfied that they had

been voted in conformity to law, he should record the statement and register the bonds in his office, and declares that no bonds shall be issued or be valid unless so registered, and having the certificate of the auditor and secretary of state endorsed thereon, showing that they were issued in pursuance of law, etc."

"The bonds in question were issued on the 1st day of July, 1879, and delivered to the railroad company, which transferred them to Fitzgerald, shortly after they were issued, in payment of construction work done by him on the railroad. The bill alleges 'that Augustus Frank purchased eighty of said bonds, of the face value of forty thousand dollars, shortly after they had been issued,' which inferentially was in 1880. The bill for relief was not filed until the 11th day of June, 1903, twenty-three years after the acquisition of the bonds. It is true that the principal of the bonds did not mature until the 1st day of July, 1890, but the coupons, representing interest, became due each year after July 1, 1879, each of which gave the holder the right to test the validity of the bonds in an action at law; and the statute gave to the holder the remedy of mandamus to compel the collection of taxes for the payment thereof. The bill discloses the further fact that soon after the purchase of said bonds said Augustus Frank presented them to the auditor of the State of Nebraska, and requested their registration and certification, both of which were refused.' He was then advised by the State auditor that they were regarded by him as invalid and not entitled to registration, on the ground that the alternative proposition submitted to the voters, making uncertain the donee named, rendered them invalid. Thus he was advised not only that the bonds lacked the required registration and certification by the designated officials of the state, but that those officers, to whom the law of the state intrusted the duty of ascertaining whether the bonds had

'been issued pursuant to law,' refused them registration and their attestation to entitle them to go upon the market. A cause of action then accrued to Frank to apply to the proper court for the writ of mandamus to compel said officers to register and certify to the bonds, if they wrongfully refused to act, or to resort to the remedy in equity his executrices now invoke."

After an interesting examination and discussion of authorities concerning equitable relief and the effect of laches, the opinion continues: "On the theory of the bill of complaint, the only impediment in the way of the collection of the bonds in a suit at law was the lack of the required registration of, and certification endorsed on, them, and that the ground on which the refusal to register and certify the bonds was bottomed was the misconception of said state officers respecting the alternative feature of the proposition submitted to the electors vitiating the election. As already shown, the validity of that objection could have been tested by the writ of mandamus. Frank, the holder of the bonds, a nonresident citizen of the State, had the right, if he preferred,

to invoke that remedy in the federal court, and take its independent judgment on said question. 'A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State court of the same locality.' *Davis v. Gray*, 16 Wall. 203, 221, 21 L. Ed. 447. See, also, *Cummings v. Bank*, 101 U. S. 157, 25 L. Ed. 903; *Schurmeier, et al., v. Connecticut Mutual Life Insurance Co.*, 69 C. C. A. 22, 137 Fed. 42. Instead of this course, Frank chose to stand inactive not only four years, whereby he permitted this adequate remedy at law to expire by limitation, but for twenty-three years, while all the changing conditions in Butler county, heretofore averted to, were taking place, and then appeals to the equity side of the court to hear and try out the question of law and fact as to whether the bonds should have been registered and certified by the auditor and secretary of state. Under such conditions the door of a court of equity ought not to be opened to such a suitor to disturb the long repose of this bond controversy." *Frank, et al., v. Butler County, Neb.*, 71 C. C. A. 571, 139 Fed. 119.

B. Authorized Delivery of Municipal Bonds Necessary to their Validity.

Delivering bonds to railroad company in payment of subscription no objection.

382. (Iowa, 1863.) It does not affect the validity of bonds issued by a city in aid of a railroad, that they were delivered to the railroad company in payment of a subscription to its stock, instead of being sold to raise money to pay for such stock. *Meyers v. City of Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *Comrs. of Marion County v. Clark*, 94 U. S. 278 (284), 24 L. Ed. 59.

Signing, issuance, and delivery of bonds.

383. (Ill. 1878.) "The bonds were signed by the officers designated for

that purpose by the charter of the railroad company, and, after the vote and subscription, it does not seem to have been necessary that the board of auditors or other corporate authorities of the town should have participated in their issue and delivery." *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416.

Estoppel by stipulation concerning delivery of bonds.

384. (Wis. 1880.) Bonds executed by a town to aid a railroad company were deposited in a bank in trust, to become the property of the railroad company when certain conditions had been performed by the company. Designated persons were to file with

the bank a certificate that such condition had been performed, and, on its receipt, the president of the bank was to certify upon the back of each bond that the conditions had been performed; the bonds were issued with such certificate thereon. Held, that the town was estopped to allege as a defense noncompliance with such conditions.

"When the bonds were 'duly certified' and delivered to the railroad company by the bank, they became, under the agreement of the parties, valid instruments, completely executed in form, and in a condition to be put on the market as commercial paper. Having on them the necessary certificate, the purchaser need not inquire whether the facts were as certified. *Anthony v. County of Jasper*, 101 U. S. 693. With the certificate indorsed, the bonds were in legal effect the same as if they had been issued by the proper officers, under full authority, without the condition which appeared on their face. Under these circumstances the condition did not destroy their negotiability." *Menasha v. Hazard*, 102 U. S. 81, 26 L. Ed. 83.

Statutory requirements as to execution and delivery of bonds; bonds not operative in default of compliance with.

385. (Mich. 1889.) A statute of Michigan authorized a township to issue and loan its bonds to a railroad company, but required that, after being executed by the township officers, the bonds should be delivered to the treasurer of the State, to be registered and safely kept by him for the benefit of the parties interested until there should be presented to him a certificate executed by the governor of the State, to the effect that such railroad company had in all respects complied with the provisions of the act and was entitled to the bonds, when the treasurer should deliver them to the company with certain indorsements thereon, and provided that, in case any bonds so delivered

to said treasurer should not, within three years from the time they should be so delivered to him, be demanded in compliance with the terms of the act, the same should be canceled by the treasurer and returned to the proper officers of the township issuing the same.

The bonds involved in this case were never indorsed and delivered by the treasurer, but were returned to the township authorities. Held, that, as the treasurer never indorsed or delivered the bonds, which acts were statutory requirements and essential to the validity of the bonds, they never became operative. *Young v. Clarendon Township*, 132 U. S. 340, 10 Sup. Ct. Rep. 107, 33 L. Ed. 356.

Bonds in escrow; delivered by trustee before performance of condition; estoppel to show; trustee agent of county; delivery by him a determination of compliance.

386. (Ky. 1898.) Bonds, after being executed by the proper county officials, were deposited with a trustee, as the law required, to be held in escrow and delivered to the railroad company upon the performance of a condition which was to be performed subsequently to the execution of the bonds and delivery to the trustee. Held, that, as, by the statute, the bonds were to be negotiable when the trustee adjudged that the condition had been complied with and delivered the bonds, the railroad company took such title as, transferred to a bona fide holder, enabled him to recover against the county, notwithstanding the condition had in fact not been performed; "that the trustee was the agent of the county and responsible to it for the manner in which he discharged his duty is obvious from the provision of the statute that he shall give 'bond, with good surety, approved by the county judge, for the faithful performance' of his duty." *Provident Life & Trust Co. v. Mercer County*, 170 U. S. 593, 18 Sup. Ct. Rep. 788, 42 L. Ed. 1156.

Unauthorized delivery of bonds by trustee holding in escrow; no estoppel by recitals.

387. (Ky. 1896.) Railroad bonds of a county, after being executed by the proper officers, were delivered in escrow to a trustee, to be by him delivered to the railroad company when the railroad should have been completed through the county, as the statute required. They were delivered by the trustee before such condition had been performed. Held, that recitals in the bonds importing compliance with the statute did not estop the county from showing that the condition had not been complied with, as purchasers had notice by the statute that the lawful delivery of the bonds was subject to the condition. *Mercer County v. Provident Life & Trust Co. of Philadelphia*, 19 C. C. A. 44, 72 Fed. 623.

Delivery of bonds held in escrow.

388. (S. Car. 1900.) "The defendant charges that these bonds were in

escrow with the Carolina Savings Bank, and that the issuance of them by that bank was fraudulent and void. But notice of the conditions on which the Carolina Savings Bank held these bonds has not been brought home to the holder of them. If the maker, or indorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered on certain conditions only, and the person to whom it is thus intrusted violate the confidence reposed in him, and put the note in circulation, this, though not a valid delivery as to the original parties, must, as between a bona fide holder for value and the maker or indorser, be treated as a delivery rendering the note or indorsement valid in the hands of such bona fide holder. *Burson v. Huntington*, 21 Mich. 415, cited and approved; *Provident Life & Trust Co. v. Mercer County*, 170 U. S. 605, 18 Sup. Ct. Rep. 788, 42 L. Ed. 1156." *Pickens Township v. Post*, 41 C. C. A. 1, 99 Fed. 659.

CHAPTER VII.

NONA FIDE HOLDERS OF MUNICIPAL BONDS; THE MUNICIPAL DECISION; RECITALS IN BONDS; WHEN PURCHASERS CHARGED WITH KNOWLEDGE OF ILLEGALITY.

- A. Bona fide holders, who are.**
- B. Presumptions in favor of bona fide holders of municipal bonds.**
- C. Construction of recitals in municipal bonds.**
- D. The municipal decision:**
 - 1. When municipality bound or estopped by recitals in its bonds.**
 - 2. When municipality estopped otherwise than by recitals in its bonds.**
- E. Cases in which municipalities are not estopped; purchasers of bonds charged with knowledge of illegality, when.**

Intimately connected with the subject of this chapter is that of authority or power to issue negotiable municipal bonds, discussed in chapter IV. Under this note and in part C of chapter IV will appear references to and extracts from the opinions in a large number of cases, in which have been discussed and decided the legal import and effect of statements and recitals contained in many issues of municipal bonds.

The rules of decisions announced in such cases do not have reference particularly to such statements and recitals as are required by law to be embodied in, or to appear upon the face of, such bonds, but they refer mainly to such statements and recitals as are generally inserted in bonds, in the nature of assurances or certificates as to the existence of facts or the performance of conditions affecting their legality, as well as any other statements or matters appearing upon the bonds, by which a purchaser may be advised of facts affecting their legality. Such recitals and statements may or may not be required by law.

Recitals so contained in the bonds in many cases have been held to estop the municipalities issuing the bonds from denying the truth of the facts so recited. This effect has been given to such recitals when the officers executing the bonds or directing

their execution have been deemed to be authorized by law, expressly or by reasonable implication, to determine whether the conditions and facts recited have been performed or do exist and to give the assurances or make the representations contained in the recitals, but not otherwise. In this respect there is a difference between matters of fact and questions of law. The estoppel is applied only as to such recitals or representations of facts. On the other hand, the rights of purchasers of such securities are affected by any matters or recitals so appearing, indicating or tending to show their illegality.

Every one dealing in such securities is charged with knowledge of the law, both common and statutory, relating thereto, regardless of any representations by public officers contained in the bonds or otherwise made.

Municipalities may likewise be estopped by similar recitals, findings, or representations embodied in ordinances, resolutions, orders, or other records evidencing their acts and proceedings relating to the issuance of bonds.

The estoppel is not applied in favor of every holder of such securities, but is applied only for the purpose of doing justice between the maker and holder of the bonds, in favor of those who stand in the relation of bona fide purchasers of the securities, and who are shown, or may be presumed, to have relied upon such representations when they invested their money.

The term "bona fide holder" is applied to one who purchases the securities for value, in the open market, before their maturity, in good faith, without knowledge or notice, actual or constructive, of any facts that might affect their validity as between the immediate parties to their issuance; and a transferee of such bona fide purchaser succeeds to all his rights as such holder.

It will be observed, however, that not all such recitals or representations of facts by such officers are held to be binding upon, and to so create an estoppel against, the municipality, but only such as those making them were authorized to make, and further, that such recitals will avail the holder as estoppels only as to matters fairly within the scope and terms of the recitals.

When public records are required by law to be made and kept, which are deemed to be intended to give notice to all persons dealing with the municipality or in its securities of facts or conditions affecting the authority of the municipal bodies to incur indebtedness by issuing bonds, and such records are shown to have been so made and kept, purchasers of such securities are

bound by the facts and conditions which are so disclosed, and may not with impunity rely upon information obtained from other sources.

A brief discussion of the subject of public records and their effect as notice and evidence and the cases bearing directly upon that subject will be found in chapter V, to which reference is here made.

It is important in this connection clearly to understand the distinction between absence of legal authority to issue the bonds, the particular bonds in a given case, and the irregular or wrongful exercise of such authority. This subject is discussed, and the cases bearing especially thereon are cited, in part C. of chapter IV.

It is also of the utmost importance to understand of what a purchaser of public securities must take notice. All persons are charged with knowledge of the law and of the powers of public bodies and their officials. This is as necessary in the conduct of public affairs generally as in the administration of justice.

A purchaser of municipal bonds is conclusively presumed to know whether there exists legal authority for the issuance of such securities by any particular public corporate body, and whether its officers, who have assumed to exercise the authority, have been legally empowered to so act, and of the terms, conditions, and requirements of all laws relating thereto. The requirements of the law relating to the exercise of this power, which purchasers are bound to know, are distinct from the facts and conditions that may or may not exist, or the acts and things that may or may not be performed or done in connection with the exercise of such power.

Such purchaser of bonds in the open market is not required to know, and is not charged with knowledge, that all such facts and conditions actually exist or that all such acts and things have been actually performed or done. As to such matters, with some exceptions elsewhere mentioned, he may generally rely upon the assurances or certificates contained in the bonds, or otherwise duly made or executed, by the proper public officials, as to their existence or performance.

More and stronger presumptions of knowledge of facts affecting the validity of such bonds, arising in connection with their issuance or the proceedings prior thereto are indulged against one who deals directly with the municipality than against a subsequent purchaser of the securities in the open market.

The matters of which purchasers of such securities must at their peril take notice are the following:

1. That there is statutory authority for the issuance of the bonds for the particular purpose by the particular municipality.

2. That the powers attempted to be conferred by the enabling statute are not inhibited by any constitutional provision, and that such statute in other respects does not violate any constitutional requirement, and that the same was duly enacted by the legislature.

3. That the bonds have been executed and issued by the officer or officers, in the form, containing the recitals, payable at or within the time, and at the place, and bearing the rate of interest, required by the provisions of the statute or statutes relating thereto, and when registration or approval by any designated official is required, that such registration has been made or such approval given.

4. He should have reliable assurance, that is, assurance upon which he has a right to rely, that the conditions, upon the performance or existence of which only the bonds could be legally issued, have been performed or do exist, and the certificate or certificates made by the officer or officers who are authorized to determine the question, to the effect that they do exist or have been performed, appearing in the form of recitals in the bonds, or otherwise made in proper form, will generally be sufficient. This proposition, however, is subject to the proviso stated in the next paragraph.

5. If, by the provisions of any law, any public record or records are required to be made and kept as the exclusive evidence of facts, conditions, or proceedings affecting the validity of such bonds, purchasers are bound to take notice, or at least are charged with knowledge, of facts and conditions thereby disclosed.

6. He must know, as a matter of law, whether or not there is legal authority for the levying and collection of taxes or assessments sufficient in amount for the payment of the particular bonds, in addition to other necessary taxes or assessments for the purposes of the municipality issuing the bonds; for a municipal bond, even when its issuance is authorized by law, is valueless unless provision for its payment may be so made.

When the foregoing conditions and facts have been found to exist, a bona fide purchaser is not required to look further.

A. Bona Fide Holders of Municipal Bonds; Who are; Their Rights.

Rights of bona fide holder of bonds.

389. (Ill. 1873.) The plaintiff was a bona fide holder of the coupons for value. "He found the bonds and the coupons upon the market, payable to the Kankakee & Illinois River Railroad Company, or bearer. Proposing to buy, he had only to inquire whether the county was by law authorized to issue them, and whether their issue had been approved by a popular vote. He was not bound to inquire further, and had he inquired he would have found full authority for the issue, and if he had also known of the consolidation it would not have affected him." *Nugent v. Supervisors*, 19 Wall. 241, 22 L. Ed. 83; *County of Moultrie v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 331, 33 L. Ed. 631.

Presumption of bona fides; rights of prior holder.

390. (Kan. 1876.) "Do, then, the plaintiffs below stand in the position of bona fide holders for value paid, and without notice of any defect or irregularity in the proceedings anterior to the issue of the bonds? In view of the findings of the Circuit Court, very plainly they do. They are the holders of the coupons in suit taken from those bonds, some of which they purchased without notice of any defense. The residue of those held by them are owned by other persons, who deposited them with the plaintiffs for collection, taking a receipt. There is no evidence when or for what consideration those other persons purchased, and no evidence of actual notice to them or to the plaintiffs of any of the facts anterior to the issue of the bonds. The findings of the court exhibit no fraud in the inception of the contracts, nor anything that casts upon the holders of the bonds or coupons the burden of showing that they are bona fide holders for value. The legal presumption therefore is that they are. But the plaintiffs are not forced to rest upon mere presumption to support their claim to be considered as having the rights of purchasers without notice of any defense. They can call to their aid the fact that their predecessors in ownership were such purchasers. To the rights of those predecessors they have succeeded." *Comrs. of Douglas County v. Bolles*, 94 U. S. 104, 24 L. Ed. 46.

No bona fide holding when total absence of authority.

391. (Ill. 1876.) "We have held that there can be no bona fide holding where the statute did not in law authorize the issue of the bonds. The objection in such case goes to the point of power. There is an entire want of jurisdiction over the subject. It is not the case of an informality, an irregularity, fraud, or excess of authority in an authorized agent. Where there is a total want of authority to issue the bonds, there can be no such thing as a bona fide holding." *Township of East Oakland v. Skinner*, 94 U. S. 255, 24 L. Ed. 125.

Notice of prior equities to transferee of innocent holder for value.

392. (Kan. 1876.) "Notice of such prior equities cannot affect the title of the second holder, if he acquired title from a prior holder who had no such knowledge. *Byles on Bills* (5th Am. ed.), 118; *Story on Notes*, § 196; *Story on Bills*, § 220." *Comrs. of Marion County v. Clark*, 94 U. S. 278, 24 L. Ed. 59.

Requisites of bona fide holding; notice from contents of bonds.

393. (Kan. 1876.) The act relied upon as authority for the issuance of the bonds was passed and approved March 1, 1872. It provided that no bonds should be issued under its authority until the question of their issue had been submitted to the legal voters of the town at an election of which thirty days' notice had been given. An election was held on April 8, 1872, and bonds were issued bearing date of April 15, 1872, containing a statement of the purpose for which they were issued, and referring to the act under which they were issued and the result of the vote. Held, no valid notice of the election could be given until the act went into effect. The bonds therefore carried on their face evidence that the law had not been complied with.

False recitals of the performance of conditions precedent, on the face of bonds, will not protect a holder when it also appears from the bonds that the law has not been complied with.

"To be a bona fide holder, one must be himself a purchaser for value with-

out notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds, which, upon their face, refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements." *McClure v. Township of Oxford*, 94 U. S. 420, 24 L. Ed. 129.

Notice to a trustee named in a mortgage does not affect holder of bonds.

394. (Kan. 1876.) Notice to a trustee named in a mortgage, executed by a railroad company, of irregularities in issuing bonds of a county to aid in the construction of such company's road, when such aid bonds are incumbered by such mortgage, does not affect the bona fides of the holders of such bonds. *Comrs. of Johnson County v. Thayer*, 94 U. S. 631, 24 L. Ed. 133.

Payment of full value not necessary to right of bona fide holder to recover full amount.

395. (Iowa, 1877.) "But, independently of the fact of such full payment, we are of opinion that a purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against its maker, though he may have paid less than its par value, whatever may have been its original infirmity. We are aware of numerous decisions in conflict with this view of the law; but we think the sounder rule, and the one in consonance with the common understanding and usage of commerce, is that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities, and those of private corporations, are constantly fluctuating in price in the market, one day being above par and the next below it, and often passing within short periods from one-half of their nominal to their full value. Indeed, all sales of such securities are made with reference to prices current in the market, and not with reference to their par value. It would introduce, therefore, inconceivable confusion if bona fide purchasers in the market were re-

stricted in their claims upon such securities to the sums they had paid for them. This rule in no respect impinges upon the doctrine that one who makes only a loan upon such paper, or takes it as collateral security for a precedent debt, may be limited in his recovery to the amount advanced or secured."

Rights of transferee of innocent holder for value.

"The rule has been too long settled to be questioned now, that, whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity. His own title and right would be impaired if any restrictions were placed upon his power of disposition. 'This doctrine, as well as the one which protects the purchaser without notice,' says Story, 'is indispensable to the security and circulation of negotiable instruments, and it is founded on the most comprehensive and liberal principles of public policy.' *Story Prom. Notes*, § 191. The only exceptions to this doctrine are those where the paper is absolutely void, as when issued by parties having no authority to contract; or its circulation is forbidden by law from the illegality of its consideration, as when made upon a gambling or usurious transaction."

Notice to purchaser of unpaid past-due coupons.

The fact that one of the interest coupons attached to county bonds was some twenty days past due was held to be but a slight circumstance, and, taken in connection with the fact that previous coupons had been paid, was insufficient to excite suspicion of any illegality or irregularity in the issue of the bonds.

"Whatever fraud the officers authorized to issue them may have committed in disposing of them, or however entire may have been the failure of the consideration promised by parties receiving them, these circumstances will not affect the title of subsequent bona fide purchasers for value before maturity, or the liability of the municipalities. As with other negotiable paper, mere suspicion that there may be a defect of title in its holder, or knowledge of circumstances

which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of the purchaser. That result will only follow where there has been bad faith on his part. Such is the decision of this court, and substantially its language, in the case of *Murray v. Lander*, reported in the 2d of Wallace, where the leading authorities on the subject are considered." *Cromwell v. Sac County*; *County of Sac v. Cromwell*, 96 U. S. 51, 26 L. Ed. 681.

Rights of assignee of holder for value.

396. (Mich. 1881.) A holder of negotiable bonds who is an assignee of a former holder for value is entitled to the rights of assignor. *New Buffalo v. Iron Co.*, 105 U. S. 73, 26 L. Ed. 1024.

Holder has rights of prior holder.

397. (N. J. 1882.) "If any previous holder of the bonds in suit was a bona fide holder for value, the plaintiff, without showing that he had himself paid value, could avail himself of the position of such previous holder. In *Byles on Bills*, 119, 124, it is correctly said that 'if any intermediate holder between the defendant and plaintiff gave value for the bill, that intervening consideration will sustain the plaintiff's title.'" The decision in *Comrs. v. Bolles*, 94 U. S. 104, reaffirmed. *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. Rep. 391, 27 L. Ed. 431.

398. (Mo. 1889.) A transferee of negotiable municipal bonds succeeds to the rights of any prior bona fide holder. *Scotland County v. Hill*, 132 U. S. 107, 10 Sup. Ct. Rep. 26, 33 L. Ed. 261.

Purchasers of bonds direct from the corporate body issuing them, not protected by recitals.

399. (Iowa, 1892.) "Nor did the plaintiff buy the bonds for value, in good faith, and without notice of any defect, from one to whom they had been issued by the district. He was himself the person to whom they were originally issued by the district, and knew, when he took the first ten bonds, that the district, in issuing them, exceeded the constitutional limit, as appearing by public records of which he was bound to take notice, and that it intended still fur-

ther to exceed that limit. Under such circumstances, he had no right to rely on the recitals in the bonds, even if these could otherwise have any effect as against the plain provision of the Constitution of the State." *Doon Township v. Cummins*, 142 U. S. 366, 12 Sup. Ct. Rep. 220, 35 L. Ed. 1044.

Bona fide holder not protected when no authority exists.

400. (Tex. 1892.) "As there was no authority to issue the bonds, even a bona fide holder of them cannot have a right to recover upon them or their coupons." *Brenham v. German-American Bank*, 144 U. S. 173, 12 Sup. Ct. Rep. 559, 36 L. Ed. 390.

What constitutes bona fides; bonds held as collateral security for loan.

401. (N. Y. 1893.) (1.) One who holds negotiable municipal bonds as collateral security for loan of money to the owner may be entitled to protection as a bona fide holder only to the extent of his claim so secured.

Purchaser must be innocent when he pays his money.

(2.) "As early as 1823, it was held by this court, in *Wormley v. Wormley*, 8 Wheat. 421, 449, to be 'a settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of the purchase money.'" Such is undoubtedly the law. *Swayze v. Burke*, 12 Pet. 11; *Tourville v. Naish*, 3 P. Wms. 306; *Paul v. Fulton*, 25 Mo. 156; *Dugan v. Vattier*, 3 Blackf. 245; *Patten v. Moore*, 32 N. H. 382; *Blanchard v. Tyler*, 12 Mich. 339; *Palmer v. Williams*, 24 Mich. 328; *Jackson v. Cadwell*, 1 Cow. 622. It is insisted, however, that this principle has no application to the purchase of negotiable instruments like the bonds in question. We know of no such distinction, however, and, in the case of *Dresser v. Missouri & Iowa Railway Construction Co.*, 93 U. S. 92, the rule was expressly applied to a purchaser of negotiable paper. In that case, the plaintiff purchased the notes in controversy, and paid \$500 as part of the consideration before notice of any fraud in the contract; and it was held that if, after receiving notice of the fraud, he paid the balance due upon the notes, he was

only protected pro tanto; that is, to the amount paid before he received notice; citing *Weaver v. Barden*, 49 N. Y. 286; *Crandall v. Vickery*, 45 Barb. 156; *Allaire v. Hartshorn*, 1 Zab. (21 N. J. Law) 665."

Must not shut his eyes to information.

(3.) "While purchasers of negotiable securities are not chargeable with constructive notice of the pendency of a suit affecting the title or validity of the securities, it has never been doubted, as was said in *Scotland County v. Hill*, 112 U. S. 183, 185, that those who buy such securities from litigating parties with actual notice of a suit do so at their peril, and must abide the result the same as the parties from whom they got their title. Under the circumstances, it was bad faith or willful ignorance, under the rule laid down in *Goodman v. Simonds*, 20 How. 343, and *Murray v. Lardner*, 2 Wall. 110, to forbear making further inquiries. No rule of law protects a purchaser who willfully closes his ears to information, or refuses to make inquiry when circumstances of grave suspicion imperatively demand it." *Lytle v. Lansing*, 147 U. S. 59, 13 Sup. Ct. Rep. 254, 37 L. Ed. 78.

Transferee of bona fide holder.

402. (Colo. 1899.) "A bona fide holder of commercial paper is entitled to transfer to a third party all the rights with which he is vested, and the title so acquired by his indorsee cannot be affected by proof that the indorsee was acquainted with the defenses existing against the paper." *Gunnison County Comrs. v. Rollins*, 173 U. S. 255, 19 Sup. Ct. Rep. 390, 43 L. Ed. 689.

Illegal contract of first purchaser does not affect subsequent holders.

403. (Mich. 1895.) It is no defense to the collection of city bonds that the original purchaser from the city agreed to pay a commission to the city treasurer. *City of Gladstone v. Throop*, 18 C. C. A. 61, 71 Fed. 341.

Transferee of innocent holder.

404. (Colo. 1897.) "A bona fide holder of commercial paper is entitled to transfer to a third party all the rights with which he is vested, and the title so acquired by his indorsee

cannot be affected by proof that the indorsee was acquainted with the defenses existing against the paper. *Comrs. v. Clark*, 94 U. S. 278, 236; *Hill v. Scotland County*, 34 Fed. 208; *Daniels Neg. Inst.*, § 803, and cases there cited. The rights of the plaintiff with respect to the remaining five bonds, which it also purchased from Stanley, may be different, as Stanley appears to have received the remaining five bonds direct from the county of Gunnison, in exchange for warrants which he owned and held, instead of purchasing the bonds in the open market." *E. H. Rollins & Sons v. Board of Comrs. of Gunnison County, Colo.*, 26 C. C. A. 91, 80 Fed. 692.

Holder has rights of prior bona fide holder.

405. (Kan. 1897.) Kiowa county, Kansas, issued two series of bonds to two different railroad companies, each issue being within the limit authorized by law, but the aggregate of both being in excess of such limit. They were bought by S. and W., respectively, who were bona fide holders, and had no knowledge of the overissue. R. purchased of S. and W. interest coupons of both series, and was chargeable with knowledge of the amount of both issues. In an action on such interest coupons, held, that R. was armed with all the rights of S. and W., from whom he purchased the two series of coupons, and was entitled to rely on the title so acquired without reference to the fact that he purchased coupons which had been detached from both series of bonds, and was thereby advised by recitals contained in both series of bonds that the total issue to both railroad companies amounted to \$180,000. *Rathbone v. Board of Comrs. of Kiowa County, Kan.*, 27 C. C. A. 477, 83 Fed. 125.

Rights of transferee of bona fide holder.

406. (Colo. 1899.) In an action upon interest coupons from bonds issued by Lake county, Colorado, it was urged by the county that the plaintiff paid nothing for them; that he received them as a gift; that some of the coupons were past due when he obtained them; and that he knew at that time that the county was defending an action upon other coupons upon

the grounds relied upon in this action.

"Let all this be conceded. Still, the father of the defendant in error, John Sutliff, was a bona fide purchaser of these bonds and coupons, without notice of any defects in, or defenses to, them, and 'a bona fide holder of commercial paper is entitled to transfer to a third party all the rights with which he is vested, and the title so acquired by his indorsee cannot be affected by proof that the indorsee was acquainted with the defenses existing against the paper.' *E. H. Rollins & Sons v. Board of Comrs. of Gunnison County*, 49 U. S. App. 399, 413, 26 C. C. A. 91, 99, and 80 Fed. 692, 700. The indorsee who takes from a bona fide purchaser of negotiable paper stands in the shoes of his indorser, and may invoke every presumption and estoppel which buttressed the claim of the latter, notwithstanding the fact that he received the paper as a gift, after its maturity, and with notice of alleged defenses to its collection. *Comrs. v. Bolles*, 94 U. S. 104, 109; *Comrs. v. Clark*, 94 U. S. 278, 286; *Board of Comrs. of Gunnison County v. E. H. Rollins & Sons*, 173 U. S. 255, 275, 19 Sup. Ct. Rep. 390; *Rathbone v. Comrs.*, 49 U. S. App. 577, 588, 27 C. C. A. 477, 482, and 83 Fed. 125, 130; *Hill v. Scotland County (C. C.)*, 34 Fed. 208; *Daniels Neg. Inst.* (4th ed.), § 803. There was no error in the ruling of the court that the defendant in error could invoke the estoppel of the recitals in the bonds to the same extent as a bona fide purchaser in support of the validity of his coupons." *Board of Comrs. of Lake County, Colo., v. Sutliff*, 38 C. C. A. 167, 97 Fed. 270.

Bona fide holder of city warrants; rights of, no greater than of original payee with notice; nonnegotiable instruments.

407. (S. Dak. 1899.) A transferee of city warrants or certificates of indebtedness, not subject to the rules of the law merchant, occupies no better position than the original payee, who had full notice of the illegal object for which they were issued, and is not protected by false recitals in the resolution ordering the warrants to be issued. *Watson v. City of Huron*, 38 C. C. A. 264, 97 Fed. 449.

Transferee of bonds has rights of bona fide transferrer.

408. (Mich. 1890.) "But it is pressed upon the court that the plaintiff does not occupy the position of bona fide purchaser, because he became their owner after their maturity. It is conceded that the People's Savings Bank purchased these bonds before their maturity, and paid full value for them, without knowledge of any defect in the proceedings resulting in their issue, but the contention is that one who acquires negotiable paper after its maturity from one who bought it in good faith before its maturity may not enjoy the same immunity from equitable and other defenses as his transferrer. The contention cannot be sustained. The assignee of a bona fide purchaser before maturity takes the same rights as his assignor had, no matter when the assignment was made."

"The plaintiff, by his counsel, produced the bonds, and thus arose the presumption that he was their owner. *Dawson Town & Gas Co. v. Woodhull*, 14 C. C. A. 464, 67 Fed. 451; *Brigham v. Gurney*, 1 Mich. 351. No evidence was introduced to show the contrary. The evidence conclusively showed that a prior owner had been a bona fide purchaser for value. The plaintiff, in becoming the owner of the bonds, acquired the benefit of the title of the intermediate bona fide purchaser, and it is immaterial how the title came to him—whether by gift or otherwise." *Rondot v. Rogers Township*, 39 C. C. A. 462, 99 Fed. 202.

Protection of bona fide holder.

409. (S. Car. 1900.) "The crucial question in this case is, does it appear from all the evidence that the plaintiff is a bona fide holder of these bonds before maturity for value, and without notice of infirmity? If he be such a holder, all controversy as to the regularity of the proceedings antecedent to the preparation, execution, and issuance of these bonds is settled by the certificate of the county commissioners, which appears on each bond. *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760." *Pickens Township v. Post*, 41 C. C. A. 1, 99 Fed. 659.

Rights of transferee of bona fide holder.

410. (S. Car. 1900.) "A bona fide holder of negotiable paper is entitled to transfer to a third person all the rights with which he is vested, and the title so acquired cannot be affected by proof that the indorsee was acquainted with the defenses existing against the paper. *Gunnison County v. E. H. Rollins & Sons*, 173 U. S. 275, 19 Sup. Ct. Rep. 300, 43 L. Ed. 689. Such are the safeguards which the law throws around negotiable paper, and which protect one holding it. Thus, the burden of proof is on the defendant to show the defects in plaintiff's title." *Pickens Township v. Post*, 41 C. C. A. 1, 90 Fed. 659.

Unpaid interest coupons affecting purchaser.

411. (S. Car. 1900.) "It is also charged that the bonds, when transferred, showed that there were coupons unpaid as well as installments of principal. But the evidence does not disclose precisely the time when *McCracken & Co.* got the bonds. Some time in 1888. If this be correct, neither principal nor coupons were past due. But, if they were, failure to pay interest alone is not sufficient in law to throw discredit upon negotiable paper, upon which it is due, to subject the holder to the full extent of his security to antecedent equities." *Morgan v. U. S.*, 113 U. S. 470, 5 Sup. Ct. Rep. 588, 28 L. Ed. 1044." *Pickens Township v. Post*, 41 C. C. A. 1, 90 Fed. 659.

Transferee of bonds after maturity and with notice of alleged defenses takes all the rights of his transferor.

412. (S. Dak. 1900.) The bona fides of a purchaser of bonds is not affected by the facts that he pleaded in his complaint that he relied, when he purchased the bonds, upon certified copies of the records of proceedings of the board, upon which the bonds were founded, when he also alleged that these copies disclosed full power in the county to issue the bonds, or because he testified that, after default in the payment of some of the coupons, he paid for the bonds with checks, or because he testified that, after default, he purchased the bonds, to the amount of \$5,000, from a friend to whom he had sold them.

"A transferee from a bona fide purchaser of negotiable municipal bonds takes all the rights of the transferor, and may invoke every presumption and estoppel from their negotiability and their recitals, in support of their validity, which the transferor might have relied upon, although the transferee takes them after maturity, with notice of the alleged defenses." *Hughes County, S. Dak., v. Livingston*, 43 C. C. A. 541, 104 Fed. 306.

Bona fides of holder; what circumstances sufficient to impeach.

413. (Cal. 1902.) Circumstances were shown which were intended to impeach the bona fides of the holder of the bonds in suit.

On this point the court say:

"There was nothing in the facts which were offered in evidence to indicate that he did not act in good faith. It was not enough that the circumstances might have been such as to create suspicion in the mind of one ordinarily prudent. In order to render the transaction invalid, facts must have come to the notice of the defendant in error or his agent of such a nature that to refrain from pursuing further inquiry would of itself amount to evidence of bad faith. *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934; *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857; *Hotchkiss v. Bank*, 21 Wall. 354, 22 L. Ed. 645; *Swift v. Smith*, 102 U. S. 442, 26 L. Ed. 193. The defendant in error had the right to purchase the bonds from anyone who could lawfully have been the owner thereof. The recitals of the bond were sufficient to protect him. He had the right to rely upon those recitals, and to believe that the bonds had been regularly issued, and that they were what they purported to be. *Hackett v. Ottawa*, 99 U. S. 86, 95, 25 L. Ed. 363; *City of Evansville v. Dennett*, 161 U. S. 434, 443, 16 Sup. Ct. 613, 40 L. Ed. 760; *Gunnison County v. E. H. Rollins & Sons*, 173 U. S. 255, 19 Sup. Ct. 300, 43 L. Ed. 689; *Waite v. City of Santa Cruz*, 22 Sup. Ct. 327, 46 L. Ed. 552." *Perris Irrigation District v. Thompson*, 54 C. C. A. 336, 116 Fed. 832.

Purchasers must take notice of the law and what appears on face of bonds.

414. (Neb. 1902.) "A purchaser of these bonds for value, in the open

market, was bound, as a matter of course, to take notice of any fact of which the bonds themselves would advise him. He was required to ascertain whether an issue of bonds to the amount of \$60,000 was in excess of ten per centum of the assessed value of all taxable property in said city, and whether a valid law had been enacted, empowering the city to issue the bonds. Beyond this point an intending purchaser was not required to prosecute inquiries relative to the validity of the bonds, but was entitled to rely on the recitals therein contained that all antecedent steps necessary to render the securities valid had been taken."

Not charged with knowledge of the following matters:

"For example, the plaintiff is not chargeable with knowledge of the provisions of the city ordinance under which the bonds were issued (*City of Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760); nor with the fact that the water company, in whose behalf the bonds were voted, had been operating a canal for some years before they were issued, for the purpose of furnishing water power for hire for private enterprises nor is the plaintiff chargeable with knowledge that the canal, as previously constructed, was narrow and deep, and that the water therein was below the surface of the surrounding country. Although these facts are stated in the special findings, yet there is no finding that the plaintiff was cognizant thereof, while there is a finding that he was a purchaser before maturity, in good faith and for value, which implies, of course, that he had no knowledge of any facts tending in any wise to impair the validity of the bonds, save such as was conveyed by the bonds themselves, and the act from which the power to issue them had been derived." *City of Kearney v. Woodruff*, 53 C. C. A. 117, 115 Fed. 90.

Holder of negotiable bonds presumed to be bona fide purchaser for value, when.

415. (Texas, 1909.) "It is, however, contended that this principle only affords protection to bona fide purchasers for value. But clearly the plaintiff is to be taken, upon the present

record, as belonging to that class; for, there was no evidence that it had knowledge or notice of any facts impeaching the validity of the bonds, or that were inconsistent with their recitals, nor was there any evidence showing that the plaintiff was not a bona fide purchaser for value of these bonds. In the absence of such proof the presumption was that the plaintiff obtained the bonds underdue, or before maturity, in good faith, for a valuable consideration, without notice of any circumstances impeaching their validity. The production of a negotiable instrument sued on, with proof of its genuineness, if its genuineness be not denied, makes a prima facie case for the holder. In other words, the possession of the bonds in this case, their genuineness not being disputed, made a prima facie case for the plaintiff. These views are in accordance with accepted doctrines of the law relating to negotiable securities. *Swift v. Tyson*, 16 Pet. 1, 16; *Murray v. Lardner*, 2 Wall. 110, 121; *Chambers County v. Clews*, 21 Wall. 317, 323; *San Antonio v. Mehaffy*, 96 U. S. 312, 314; *Montclair v. Ramsdell*, 107 U. S. 147, 158; 2 *Parsons' Bills and Notes*. 9; *Pinkerton v. Bailey*, 8 Wend. 600; *Story on Promissory Notes*, 196; 1 *Daniel on Negotiable Instruments*, 5th ed., 812, and the authorities there cited; *Chitty on Bills*, 11th Amer. ed. 69; *Arbouin v. Anderson*, 1 *Adolph. & Ellis*, New R. 408, 504." *Presidio County, Texas, v. The Noel-Young Bond & Stock Company*, 212 U. S. 58, 20 Sup. Ct. Rep. 237, — L. Ed. —.

Recitals of compliance with legal requirements, burden in such cases.

416. (Ill. 1906.) Bonds were issued containing recitals importing compliance with terms of the enabling act.

In an action on the bonds, held: "Authority for issuing the bonds thus appeared from the recitals, so the rule upheld in *Lincoln v. Iron Co.*, 103 U. S. 412, 416, 26 L. Ed. 518, and *County of Clay v. Society for Savings*, 104 U. S. 579, 586, 26 L. Ed. 856, is plainly applicable, namely, that the holder in such case can rest, primarily at least, upon the presumption arising from the recitals, and the burden of showing want of authority is cast upon the defendant, if provable in any

view." *Northwestern Savings Bank v. Town of Centreville Station, Ill.*, 74 C. C. A. 275, 143 Fed. 81.

Bona fide holder protected by recitals, unless standing as bona fide holder impeached.

"The plaintiff, in error, however, is a bona fide holder of the bonds for value, under the averments, and, unless its standing is impeached as such holder, the rule is settled beyond controversy in the federal jurisdiction that the municipality is bound by the recitals in the bond when vested with legislative authority to issue bonds for the purpose recited. In the leading case of *Commissioners of Knox Co. v. Aspinwall*, 21 How. 539, 545, 16 L. Ed. 208, the doctrine was thus pronounced, and it is reaffirmed in a uniform line of decisions (collated in 3 Notes U. S. Rep. 897), including the recent case of *Stanly Co. v. Coler*, 190 U. S. 437, 450, 23 Sup. Ct. 811, 47 L. Ed. 1126. Consequently, inquiry is not open, by way of defense, whether the improvements for which the money was borrowed and expended were strictly within the meaning of the act referred to, as the nature of the improvements does not appear from the recitals. Although the purchaser of the bonds is chargeable with notice of the terms of the legislative authority, he is not bound to ascertain the regu-

larity of the municipal action thereunder, in the face of these recitals and their conclusive import, under the doctrine stated." *Northwestern Savings Bank v. Town of Centreville Station, Ill.*, 74 C. C. A. 275, 143 Fed. 81.

Bona fide purchaser's rights pass to his vendee.

417. (Colo. 1908.) "In view of the conclusion just stated, it is unnecessary to consider whether Hickman was an innocent holder for value of the bonds in controversy; but as that question was argued and may arise at some other time, we may properly dispose of it now. The undisputed proof is that Hickman acquired his bonds from the Denver Savings Bank, which was an innocent purchaser and bona fide holder thereof before maturity. In such circumstances the bank passed its title to its vendee, and the latter is not affected by proof that he was acquainted with facts constituting a defense to the bonds at the time he purchased them. He is entitled to stand in the shoes of his vendor. Whatever rights the bank had he may assert in this action. *Gamble v. Rural Independent School District*, 146 Fed. 113, 70 C. C. A. 539, and cases cited." *Town of Fletcher v. Hickman*, 91 C. C. A. 353, 165 Fed. 403.

B. Presumptions in Favor of Bona Fide Holders of Municipal Bonds.

Presumption of performance of precedent conditions.

418. (Pa. 1863.) "It is claimed that the contract is for the borrowing of money, and that the complaint is bad, because it does not aver the sanction of two-thirds of the electors of the city. If the fact were so, the consequence would not follow. If the city could make such a contract with that sanction, the sanction will be presumed until the contrary is shown. The nonexistence of the fact is a matter of defense which must be shown by the defendant." *Seybert v. City of Pittsburgh*, 1 Wall. 272, 17 L. Ed. 553.

When there is power to issue.

419. (Iowa, 1863.) "When a corporation has power, under any circumstances, to issue negotiable securities,

the bona fide holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." *Gelpcke, et al., v. The City of Dubuque*, 1 Wall. 175, 17 L. Ed. 520.

Precedent conditions; presumption of performance.

420. (Kan. 1871.) When there is authority of law for the issuance of bonds by a municipal body dependent upon the existence or performance of some precedent conditions, and such bonds have been issued, appearing to be with legal requirements, "it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached

to the exercise of the power has been fulfilled." *Pendelton County v. Amy*, 13 Wall. 297, 20 L. Ed. 579.

Presumption of bona fide holding; protection against prior equities.

421. (Ky. 1871.) When there is legal authority for the issuance of municipal bonds, and such bonds have been issued purporting to have been issued by authority of such law, there is a prima facie presumption that the holder acquired them before they were due, that he paid a valuable consideration for the same, and that he took them without notice of any defect which would render the instruments invalid.

"Holders of such instruments, if the same are indorsed in blank or are payable to bearer, are as effectually shielded from the defense of prior equities between the original parties, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments." *City of Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809.

Possession of negotiable bonds; presumption.

422. (Kan. 1876.) "Possession, even without explanation, is prima facie evidence that the holder is the proper owner or lawful possessor of the instrument; and the settled rule is, that nothing short of fraud—not even gross negligence—is sufficient to overcome the presumption and invalidate the title of the holder, as inferred from his actual custody of the instrument."

"Where the theory that the plaintiff paid value for the instrument depends solely upon the prima facie presumption arising from the possession of the instrument, the defendant may, if the pleadings admit of such a defense, prove that the instrument originated in illegality or fraud; and the rule is, if he establishes such a defense, that a presumption arises that the subsequent holder gave no value for it, and it is also true that such a presumption will support a plea that the holder is a holder without consideration, unless the presumption is rebutted by proof that the plaintiff paid value for the instrument, in which event the plaintiff is still entitled to recover."

"But the rule is different when the

question is whether the indorsee and holder had notice of the prior equities between the antecedent parties to the instrument. Holders of such instruments, under such circumstances, are not obliged to show that they paid value for the instrument until the other party has clearly proved that the consideration was illegal, or that it was fraudulent in its inception, or that it has been lost or stolen before it came to the possession of the holder." *Comrs. of Marion County v. Clark*, 94 U. S. 278, 24 L. Ed. 59.

Presumption of legality.

423. (Mo. 1877.) "The purchaser therefore was apprised by the law that power existed in the County Court to issue such bonds, without any election of the people; and there was nothing on their face to show that they were not regularly issued. It was not incumbent on him to inquire whether the railroad company had pursued all the regular steps necessary to entitle it to receive the bonds. Its agents, that is, the agents of the branch road, had them for sale, and he had a right to presume that they were lawfully entitled to them." *County of Henry v. Nicolay*, 95 U. S. 619, 24 L. Ed. 394.

Presumption of bona fides of holder.

424. (Tex. 1877.) "The holder of commercial paper, in the absence of proof to the contrary, is presumed to have taken it underdue for a valuable consideration, and without notice of any objection to which it was liable."

Presumption of legal issuance.

"The rule in such cases is, that if the municipality could have had power under any circumstances to issue the securities, the bona fide holder has a right to presume they were issued under the circumstances which give the authority, and they are no more liable to be impeached in his hands for any infirmity than any other commercial paper." *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816.

When there is power under any circumstances.

425. (Mo. 1877.) "This court has repeatedly held that where a corporation has power under any circumstances to issue such securities, the

bona fide taker has a right to presume they were issued under circumstances which gave the requisite authority, and that they are no more liable to be impeached for any infirmity, in the hands of the holder, than any other commercial paper. *Supervisors v. Schenck*, 5 Wall. 772." *County of Macon v. Shores*, 97 U. S. 272, 24 L. Ed. 889.

Presumption of proper exercise of power.

428. (N. Y. 1878.) "The bonds in question have all the properties of commercial paper, and in the view of the law they belong to that category. *Murray v. Lardner*, 2 Wall. 110. This court has uniformly held, when the question has been presented, that where a corporation has lawful power to issue such securities, and does so, the bona fide holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to denying the truth of the recital." *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404.

Presumption of legality: recitals.

427. (N. J. 1879.) "The bonds in question recite on their face that they were issued 'in pursuance of an act of the legislature of New Jersey, approved April 9, 1868, entitled 'An act to authorize certain townships, towns, and cities to issue bonds and to take the bonds of the Montclair Railway Company.' In *Orleans v. Platt*, 99 U. S. 676, this court said: 'The bonds in question have all the properties of commercial paper, and in the view of the law they belong to that category. *Murray v. Lardner*, 2 Wall. 110. This court has uniformly held, when the question has been presented, that where a corporation has lawful power to issue such securities and does so, the bona fide holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital.'" *Pompton v. Cooper Union*, 101 U. S. 196, 25 L. Ed. 803.

Bona fides presumed from possession; proof in suit on bonds.

428. (N. J. 1882.) A holder of negotiable municipal bonds is presumed to have acquired them in good faith and for value.

"Legislative authority for an issue of bonds being established by reference to the statute, and the bonds reciting that they were issued in pursuance of the statute, the utmost which plaintiff was bound to show to entitle him, *prima facie*, to judgment, was the due appointment of the commissioners and the execution by them, in fact, of the bonds. It was not necessary that he should, in the first instance, prove either that he paid value, or that the conditions preliminary to the exercise by the commissioners of the authority conferred by statute were in fact performed before the bonds were issued. The one was presumed from the possession of the bonds; and the other was established by the statute authorizing an issue of bonds, and by proof of the due appointment of the commissioners, and their execution of the bonds, with recitals of compliance with the statute." *Montclair v. Ramsdell*, 10, U. S. 147, 2 Sup. Ct. Rep. 391, 27 L. Ed. 431.

Meetings of county court; presumption of legality.

429. (Mo. 1884.) "The records of the County Court which were put in evidence show affirmatively that all the justices were present and acting at the adjourned and special terms when the orders were made directing the subscription to the stock and providing as to the terms of the contract. The last order was made at a regular term. Under these circumstances, it is certainly to be presumed, in the absence of anything to the contrary, that the terms were regularly called and held. It was therefore no error to admit the records in evidence without proof of the order for the adjourned term, or the call for the special term. The fact that the order of the 7th of August, 1871, is referred to in the recitals of the bond as having been made on the 12th, is unimportant." *County of Dallas v. McKenzie*, 110 U. S. 686, 4 Sup. Ct. Rep. 184, 28 L. Ed. 285.

Presumption of bona fides.

430. (Kan. 1885.) "In the present case there was nothing shown to re-

but the presumption arising from the coupons, that the plaintiff was prima facie the holder of them for value. The defendant did not show any want, or failure, or illegality, of consideration." *Anderson County Comrs. v. Beal*, 113 U. S. 227, 5 Sup. Ct. Rep. 433, 28 L. Ed. 966.

Presumption of compliance with legal requirements.

431. (Mo. 1893.) "The election was held, the votes cast at that election were canvassed by the proper officers, and an order made by the County Court for a subscription in accordance with the terms of the order for the election. From these facts it may be presumed that proper notices of the election were given; for it is a rule of very general application, that where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act. In *Bank of the United States v. Dandridge*, 12 Wheat. 64, 70, it was said: 'The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them, as matters of right or matters of duty.'" *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. Rep. 267, 37 L. E. 93.

Presumption in favor of validity of bonds.

432. (Mich. 1895.) "It is said the bonds were illegal because in excess of 5 per cent. of the assessed value of the property in the district. There

is no evidence what the assessed value of the district was. It is in evidence that the total assessed value of the entire village was \$379,000, and 5 per cent. of that is \$19,000. This leaves it entirely possible that that 5 per cent. of the abutting property on Delta avenue, which constituted the assessment district, much exceeded \$10,000, and until it is otherwise shown to the contrary, it will be presumed, in support of the validity of the bonds, that this limitation was not exceeded." *City of Gladstone v. Throop*, 18 C. C. A. 61, 71 Fed. 341.

If bonds may be valid under any state of facts made to appear, so held.

433. (Colo. 1897.) County bonds containing recitals importing compliance with the Constitution and statutes of the State, on their face purported to be funding bonds issued, "for valid floating indebtedness." Held, that, as such bonds would not create a new debt, assuming the warrants for which they were issued to have been valid, but would simply change the form of an existing indebtedness; and as a purchaser of such bonds in the light of constitutional provisions limiting county indebtedness and the certificates of county indebtedness required by statute to be made and recorded, would have been unable to say that the recitals were false; if upon any theory the bonds might have been valid, a purchaser was entitled to presume that such was the fact, that the recitals were true and that the Constitution had not been violated. *E. H. Rollins & Sons v. Board of Comrs. of Gunnison County, Colo.*, 26 C. C. A. 91, 80 Fed. 692.

Presumption that public officer has performed his duty.

434. (Colo. 1899.) When the Constitution or the act under which the bonds were issued prescribes the public record which furnishes the test of compliance with the constitutional debt limitation, the court will presume, in the absence of all evidence upon the subject, that the officers charged with the duty of providing or making such records perform their said duty, as required by the Constitution or statute. *Board of Comra of Lake County, Colo. v. Sutliff*, 38 C. C. A. 167, 97 Fed. 270.

Presumption of bona fides.

435. (S. Car. 1900.) "Now, the holder of a negotiable instrument is presumed to have taken it before maturity, for valuable consideration, and without notice of any objection to which it was liable, and this presumption stands until overcome by sufficient proof. *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Chambers County v. Clews*, 21 Wall. 317, 22 L. Ed. 517; *San Antonio v. Mehaffy*, supra; *Montclair Township v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. Rep. 391, 27 L. Ed. 431. To impeach the title of a holder for value of negotiable paper, by proof of any facts and circumstances outside of the instrument itself, it must first be shown that he had knowledge of such facts and circumstances at the time the transfer was made. *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934. Such a holder is not affected by anything which has occurred between other parties, unless he had knowledge thereof at the time of purchase. *Brown v. Spofford*, 95 U. S. 474, 24 L. Ed. 508." *Pickens Township v. Post*, 41 C. C. A. 1, 99 Fed. 639.

Presumption of validity.

436. (Colo. 1901.) "A state of facts might therefore have existed under which the bonds might have been valid; and, if conditions and circumstances might have existed under which they would have been lawful under the law, the presumption was that they were so."

"Each bond constitutes a separate and independent cause of action against the county, and the presumption of its validity goes with it to the end, and must prevail unless it is overcome by a fair preponderance of competent evidence that the warrants for which that particular bond was exchanged evidenced unauthorized obligations." *Board of Comrs. v. Keene Five-Cent Savings Bank*, 108 Fed. 505, 47 C. C. A. 464; *Independent School District v. Rew*, 111 Fed. 1, 49 C. C. A. 198.

Recitals in bonds, presumption of performance of conditions.

437. (Ohio, 1906.) Action at law on refunding bonds and coupons. Each bond contained the following recitals:

"This bond is one of a series of eleven bonds of like date, amounting in the aggregate to five thousand, seven

hundred and forty-five (\$5,745.00) dollars, issued for the purpose of providing the means to pay the indebtedness made upon corporation building and electric light plant. This bond as well as other bonds herein referred to, is issued under and by virtue of section 2701, Rev. St. of Ohio, and in pursuance of an ordinance passed by the council of said village on the 18th day of May, A. D., 1901, entitled, 'An ordinance to issue bonds, etc., and it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issue of said bonds have been properly done, happened and performed in regular and due form as required by law.'

"The validity of the bonds is assailed on the ground that the village acted without authority in issuing the note and time orders for the indebtedness incurred for the purpose of improving the corporation building and electric light plant; that this indebtedness was therefore not valid but void, and could furnish no foundation for the issue of the refunding bonds under section 2701; and, finally, that any would-be purchaser of the bonds, by reading the ordinance recited therein, would have been advised of this fact, and therefore took the bonds with notice of their invalidity. The bonds state that the indebtedness which they were intended to extend, was incurred upon 'corporation building and electric light plant,' the ordinance that the note and time orders to be paid by the proceeds of the bonds, were issued for the purpose of improving electric light and real estate,' and the resolution recites a similar purpose. The question, therefore, is, whether the council of the village had authority to improve the real estate or building of the municipality and its electric light plant. If, under the law of Ohio, such power existed, although upon condition, it is to be presumed that the condition attached to the exercise of the power had been complied with, for the bonds so recite. *City of Defiance v. Schmidt*, 123 Fed. 1, 59 C. C. A. 159, 164."

Council's determination as to debt refunded.

"Before issuing the bonds, the council was required to determine by a

formal resolution, that the indebtedness to be extended, was an existing valid and binding obligation of the municipality (section 2701), and in the bonds themselves to state the purpose for which they were issued, and under what ordinance (section 2703). These requisites were complied with, and there was nothing either in the bonds or the ordinance or the resolution, taken in connection with the general recitals, to put the purchaser upon notice of any irregularity, but everything to give him assurance that

the bonds were valid and binding obligations of the municipality. If there was any irregularity in creating the original indebtedness (which does not appear in anything before us), the village is estopped to show it, under the circumstances. *Village of Kent v. Dana*, 103 Fed. 50, 40 C. C. A. 281; *City of Defiance v. Schmidt*, 123 Fed. 1, 59 C. C. A. 159, 163, and cases cited; *Kinney v. Eastern Trust & Banking Co.*, 123 Fed. 297, 59 C. C. A. 586; *Village of Bradford v. Cameron*, 76 C. C. A. 21, 145 Fed. 21.

C. Construction of Recitals in Municipal Bonds.

Recitals of performance of conditions.

438. (Ill. 1881.) Bonds were issued by the town of Bruce to aid in the construction of a railroad. They recited that they were "Issued by virtue of" the law mentioned, that at a special election a majority of the legal voters voted in favor of the same. In a suit on the bonds by a bona fide holder, a township set up as grounds of defense nonperformance by the railroad company of several condition required by the terms of the contract of subscription. Held, that the recitals contained in the bonds, "fairly imported that nothing remained to be done in order to make the bonds binding obligations upon the town, in the hands of bona fide purchasers." *Insurance Co. v. Bruce*, 105 U. S. 328, 26 L. Ed. 1121.

Construction of recitals in bonds, when strict.

439. (Iowa, 1892.) The Constitution of Iowa limited the aggregate indebtedness of counties and other political or municipal corporations to five per centum on the value of the taxable property within such corporation, to be ascertained by the last State and county tax lists, previous to the incurring of such indebtedness. Bonds issued by a school district in Iowa recited that they were "issued by the board of school directors by authority of an election of the voters of said school district held on the 31st day of July, 1869, in conformity with the provisions of chapter 98 of acts twelfth general assembly of the State of Iowa."

This recital and its import held to be different from that of a recital that they were "issued by authority

of the election of July 31, 1869, and in conformity with the provisions" of the statute referred to. Held, also, that a strict construction of recitals contained in bonds "ought to be the rule when it is proposed, by mere recitals upon the part of the officers of a municipal corporation, to exclude inquiry as to whether bonds, issued in its name, were made in violation of the Constitution and of the statute, of the provisions of which all must take notice. Numerous cases have been determined in this court, in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers invested with authority to determine whether such conditions have been performed, the responsibility of issuing them, when such conditions have been complied with, recitals by such officers, that the bonds have been issued, 'In pursuance of' or 'in conformity with,' or 'by virtue,' or 'by authority of,' the statute, have been held, in favor of bona fide purchasers for value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued. But in all such cases, as a careful examination will show, the recitals fairly imported a compliance, in all substantial respects, with the statute giving authority to issue the bonds. We are unwilling to enlarge or extend the rule, now established by numerous decisions. Sound public policy forbids it. Where the holder relies for protection upon

mere recitals, they should, at least, be clear and unambiguous, in order to estop a municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation, or without authority, of law." *School District v. Stone*, 106 U. S. 183, 1 Sup. Ct. Rep. 84, 27 L. Ed. 90.

Absence of recitals in bonds.

440. (Miss. 1884.) "We do not think the plaintiff in error is precluded from raising this question by any recitals in the bonds. They contain no statement of any election called or held, or of the vote by which the issue of the bonds was authorized. They do not embody even a general statement that the bonds were issued in pursuance of the statutes referred to. The utmost effect that can be given to them is, that of a statement, that a subscription to the capital stock of a railroad company was authorized by the statutes mentioned, and that the sum mentioned in the bonds was part of it. They serve simply to point out the particular laws under which the transaction may lawfully have taken place. They say nothing whatever as to any compliance with the requirements of the statute in respect to which the board of supervisors were authorized and appointed to determine and certify. They do not therefore, within the rule of decision acted on by this court, constitute an estoppel, which prevents inquiry into the alleged invalidity of the bonds." *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. Rep. 539, 28 L. Ed. 517.

Recitals in bonds, effect of; express recitals as to statutory requirements; no estoppel as to constitutional requirements.

441. (Colo. 1889.) "Nothing is better settled than this rule—that the purchaser of bonds, such as these, is held to know the constitutional provisions and the statutory restrictions bearing on the question of the authority to issue them; also the recitals of the bonds he buys; while, on the other hand, if he act in good faith and pay value, he is entitled to the protection of such recitals of facts as the bonds may contain." Bonds issued by Lake county, Colorado, contained recitals to the effect that they were issued "under and by virtue of

and in compliance with" the statute; that "All the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond;" and that the issuing was "Authorized by a vote of a majority of the duly qualified electors," etc.; no express reference being made to the Constitution, nor any statement made that the constitutional requirements had been observed. Held, that such recitals create no estoppel as to a constitutional limitation on indebtedness. *Lake County v. Graham*, 130 U. S. 674, 9 Sup. Ct. Rep. 654, 32 L. Ed. 1065.

Construction of recitals in bonds.

442. (Mich. 1894.) "But it is claimed in behalf of the defendant that these obligations bore upon their face a reference to the ordinance directing their issue, which disclosed their fraudulent character, and that the recital of the ordinance was notice to any purchaser of the bonds of the facts appearing from the ordinance and which he would have learned from an inspection thereof. This brings us to the vital question in the case, and presents the point upon which the court below seems to have turned the case in favor of the defendant. In order to determine what effect should be given to this part of the recitals in the bonds, reference must be had to the whole instrument under the just and familiar rule of construction. In one part of each of the bonds it was represented that it was an 'improvement bond.' This, taken in connection with the subsequent reference to the statute, meant that it was a bond issued to provide means for a public improvement. In another place it was represented that the bond was 'issued under and by authority of a special act of the State of Michigan, entitled "An act to authorize the village of Howell to make public improvements in the village of Howell," being act 248 of the local acts of 1885, of the legislature of the State of Michigan, approved February 25, 1885, and also under the ordinance of the village of Howell, passed August 12, 1895.' What was the meaning of this representation? To say that a thing is done 'under and by the authority' of a statute referred to is equivalent to saying that it is

done in conformity with it, and authorized by it."

"Bringing all the recitals in the bonds together, they amount to a representation that they were issued to raise money to defray the expenses of a public improvement of a kind to be determined by the common council, that the requirements of the law had all been complied with, and that an ordinance in conformity with the law had been passed directing their issuance; for if the ordinance was not in conformity with the law, inasmuch as it preceded the issue of the bonds, it falsified the preceding statement that the bonds were issued in conformity with the statute. And we can entertain no doubt whatever but that this was precisely the way in which the framers of these bonds intended the recitals to be construed. They were inserted to fortify the bonds, and give assurance of their legal validity to purchasers, and invite their confidence. Read in the light of the known purpose of the makers, it cannot but be believed that it was intended to represent that the ordinance for the issue of the bonds was in pursuance of the statute which had just been recited. Least of all can it be believed that the framers of these bonds intended by the reference to the ordinance to challenge the attention of purchasers to it, or expect that that would follow by reason of the reference. The general rule of construction applies, that in determining the intent and meaning of any part the general purpose of the whole is to be regarded. And it would seem a very just rule also that the meaning which the maker of an instrument intends and expects the other party to put upon it should be adopted if the other has accepted it in that sense, and the words will bear that construction." *Risley v. Village of Howell*, 12 C. C. A. 218, 64 Fed. 453.

Effect of recitals in bonds; when they estop.

443. (S. Dak. 1901.) "A recital of a compliance with the authorizing act by the officers of a municipality or quasi-municipality, in a bond which they issue, estops the municipal body from denying every fact connected with or growing out of the discharge of the ordinary duties of such officers,

which under the law they were required to ascertain before they issued the bonds, after the securities pass into the hands of bona fide purchasers. *Hughes County v. Livingston*, 43 C. C. A. 541, 104 Fed. 306, 311, 313, 315-318, and the cases cited on those pages. If the laws are such that there might, under any state of facts or circumstances, be legal authority in the municipality or quasi-municipality to issue its bonds, it may by recitals therein estop itself from denying that those facts or circumstances existed; and that it had lawful power to send them forth, unless the Constitution or act under which the bonds are issued prescribes some public record as the test of the existence of some of those facts or circumstances."

Rule of construction of recital.

"It is a general rule of law that while general terms, when used by themselves, must have their ordinary significance, yet, when there is a particular recital followed by general words, the latter are qualified by the particular recital."

An act of South Dakota authorized the board of education of Pierre, South Dakota, to borrow and issue bonds, in order to raise sufficient funds "for the purchase of a school site or sites, or to erect a suitable building or buildings thereon." Bonds were issued reciting that they were issued for the purpose of providing funds for "the purchasing of the schoolhouse sites, the erection of school buildings and general improvements." Held, that this recital was not notice to a purchaser of the bonds that they were issued for an illegal purpose. *Board of Education of City of Pierre v. McLean*, 106 Fed. 817.

Recitals that import compliance with law.

444. (It will be observed that, in the cases which appear in part D of this chapter, expressions contained in the recitals of bonds that they were issued "in pursuance of"—"pursuant to"—"by virtue of"—"in accordance with"—"by authority of"—"under authority of" the law, or of an ordinance or resolution, or of a vote of the electors, etc., have all been held to mean and import that in the issuance of the bonds the requirements

of the law, ordinance, resolution, or the proposition voted upon, have been complied with. In construing any recitals in bonds the courts give effect to the reasonable import and meaning of the language used.)

Construction of recitals—"issued under" act.

445. (Iowa, 1901.) "The bonds could have been lawfully issued only to refund just debts of the district township evidenced by unsatisfied judgments. The recitals in the bonds that they were issued under the provisions of chapter 51 estopped the district township from denying (1) that there were just debts of the township, evidenced by unsatisfied judgments against it rendered before chapter 51 was enacted, which warranted the issue of the bonds, because a municipal corporation is estopped from defeating an action by an innocent purchaser to collect its negotiable bonds, which recite that they were issued for the purpose of funding the judgments, bonds, warrants, or floating debt of the corporation, on the ground that the apparent debt they were issued to satisfy was invalid or fictitious;" "(2) that the corporation and its officers have applied the bonds to the lawful purpose for which they appear on their face to have been issued;" "and (3) that the bonds were exchanged for the fundable debt in the method prescribed by the law, so that they neither increased nor diminished the indebtedness of the municipality."

"In other words, the plaintiff in error is conclusively estopped by the recitals in the bonds from denying that they neither created nor increased the indebtedness of the district township, and that the judgment debts for which they were exchanged were just debts of the township incurred before its indebtedness reached the constitutional limit."

"But the question that has been under consideration here is not one of the construction of the constitution or of the statutes of the State of Iowa. It simply involves the construction and effect of recitals in negotiable instruments. It is a question of commercial, and not of constitutional, law, upon which the decisions of the State courts are not controlling in the Federal tribunals." *Independ-*

ent School District v. Rew, 111 Fed. 1, 49 C. C. A. 198.

Recital of purpose of issue; construction; effect of as estoppel.

446. (Ohio, 1901.) Section 2703 of the Revised Statutes of Ohio provides that "All bonds issued under authority of this chapter, shall express upon their face the purpose for which they were issued and under what ordinance."

The bonds in suit contained the following recital:

"This bond is issued under and pursuant to the provisions of sections 2700 and 2701 of the Revised Statutes of Ohio, and the ordinance of the council of said village entitled 'An ordinance to authorize the issue and sale of bonds to pay certain indebtedness of the village of Marice City, Ohio, incurred in the improvement of said village,' passed on the fifteenth day of October, in the year one thousand eight hundred and eighty-nine, and for the purposes therein set forth; and it is hereby specially declared that all the proceedings and steps required, either by said statutes or ordinance, to be had or taken preliminary to the issue hereof, have been duly had and taken by said village and its officers and agents." Held, that this recital was a sufficient statement of the purpose for which the bonds were issued and of the ordinance under which they were issued. Held, also, that the recital was, "equivalent to a representation that they were issued for the purpose stated in the statute giving the authority, namely, for the purpose of extending the time for the payment of an indebtedness which, from its limits of taxation, such corporation is unable to pay at maturity; for they would not be issued pursuant to the provisions of the statute if they were issued for a purpose not authorized by it. The representation would be false." Held, also, "Whether the indebtedness for the extension of which the bonds are issued was a valid obligation of the village was one to be settled by the council when they issued the bonds. No other board or officer for this purpose is provided, and that question is necessarily referred to the council, which represents the village in the transaction." *Clapp v. Village of Marice City*, 111 Fed. 103, 49 C. C. A. 251.

Recitals in bonds "issued by authority of."

447. (N. Car. 1902.) "Moreover, is not the legal effect of the recitals in the bonds stating that they were issued by authority of sections 1996, 1997, 1998 and 1999 of the Code of North Carolina equivalent to a statement that the facts existed which authorized their issue under those sections, viz., that they were issued to aid in the completion of a railroad in which the citizens of the county had an interest, and is not the county now estopped from denying that recital? It seems to us that many cases have so held. *Chaffee Co. v. Potter*, 142 U. S. 355, 364, 12 Sup. Ct. 216, 35 L. Ed. 1040; *City of Evansville v. Dennett*, 161 U. S. 434-442, 16 Sup. Ct. 613, 40 L. Ed. 760; *Board of Comrs. v. National Life Ins. Co.*, 32 C. C. A. 591, 90 Fed. 230, 291; *Hughes Co. v. Livingston*, 43 C. C. A. 541, 104 Fed. 306-316; *School Dist. v. Rew*, 49 C. C. A. 198, 111 Fed. 1, 7, 8; *Belo v. Commissioners*, 76 N. C. 489, 493, 494, 495." *Board of Comrs. of Stanley Co. v. Coler*, 51 C. C. A. 379, 113 Fed. 705.

Recitals in bonds, construction and effect.

448. (Neb. 1905.) In an action at law on interest coupons. Held: "The bonds themselves contain a recital that they were 'issued under and by authority of the laws of the State of Nebraska found in' certain chapters of the publications of those laws there specified. A recital in municipal bonds that they have been issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of,' the statute or laws which authorize their issue, is in legal effect a recital that the conditions precedent to a valid issue have been performed. *City of Evansville v. Dennett*, 161 U. S. 434, 443, 16 Sup. Ct. 613, 40 L. Ed. 760; *City of Huron v. Second Ward Sav. Bank*, 80 Fed. 272, 279, 30 C. C. A. 38, 45, 49 L. R. A. 534.

"The bonds were issued in 1890, and the county paid the interest upon them annually until the year 1900. The plaintiff purchased the coupons in suit for value, without notice of any defense to them or defect in them, in reliance upon the recital in the bonds. Where innocent purchasers are induced to invest their money in the bonds or obligations of a municipi-

ality or quasi-municipality by the authorized recitals or statements of its officers to the effect that they were issued by authority of the law and by the commercial credit given to them by the payment of interest for a series of years, reason and justice alike demand that the obligors should be estopped from denying these recitals to defeat the bonds and that their payment should be enforced, unless some insuperable legal obstacle has intervened to prevent this result. *Evansville v. Dennett*, 161 U. S. 434, 446, 16 Sup. Ct. 613, 40 L. Ed. 760." *Platt v. Hitchcock County, Neb.*, 71 C. C. A. 649, 139 Fed. 929.

Recital of issuance "in pursuance of and in accordance with" the law.

449. (Iowa, 1906.) A school district issued its refunding bonds in 1882, due ten years after date. In 1885 the district was divided into two districts and the assets and liabilities, except said issue of bonds, were divided between the two new districts, the said issue of bonds not being taken into consideration for the reason that they were thought to be illegal and void. This suit was prosecuted by a holder of some of the bonds to compel the new districts to pay their respective equitable shares of such bonds.

"The recitation on the face of the bonds that they were issued 'in pursuance of and in accordance with chapter 132, p. 127, Acts of the Eighteenth General Assembly of Iowa,' would have estopped the Riverside district, were it in existence, and estops the defendants, as its successors, from asserting as against innocent holders of the bonds for value that the district had no fundable debt, or that the new bonds created an indebtedness in excess of the constitutional limit."

Purchaser of bond after maturity acquires rights of prior bona fide holder.

"The Riverside school district was estopped, so far as Mrs. Spafford or her daughter was concerned, by the recital on the face of bond No. 43 from denying its validity, or their right to recover its full face value. In their hands the bond was purged of all infirmity or illegality. Story on Promissory Notes, 101, and cases

cited. They possessed, as an incident to the ownership of the bond, the right of free and unembarrassed alienation on terms satisfactory to them and the purchaser. So far the rights of the parties are not debatable, but the question is raised whether complainant, a purchaser of the bond from the daughter, takes it impaired in value by reason of his purchase of it

after maturity, or whether he takes it with all the legal incidents or rights possessed by her."

Held, citing authorities, that such purchaser succeeded to the rights of a prior bona fide holder. *Gamble v. Rural Independent School District of Allison*, et al., 76 C. C. A. 539, 146 Fed. 113.

D. The Municipal Decision.

1. *When Municipality Bound or Estopped by Recitals in its Bonds; Grounds of the Estoppel.*

Recital of issue by order of board of commissioners and in pursuance of statute; bona fide purchaser protected.

450. (Ind. 1858.) "The bonds on their face import a compliance with the law under which they were issued. 'This bond,' we quote, 'is issued in part payment of a subscription of \$200,000, by the said Knox county, to the capital stock, etc., by order of the board of commissioners,' in pursuance of the third section of the act, etc., passed by the general assembly of the State of Indiana, and approved 15th January, 1849." Held, that a bona fide purchaser of the bonds was not bound to look further for evidence of a compliance with conditions to the grant of the power. *Comrs. of Knox County, Indiana, v. Aspinwall*, et al., 21 How. 539, 16 L. Ed. 208.

Grounds upon which determination as to performance of precedent conditions are held conclusive.

451. (Ind. 1860.) "Capitalists could not be expected to accept such paper, and advance money for it, unless the authority to issue it was put beyond dispute. They certainly could not pay value for such securities, with knowledge that the question under consideration would be open to litigation whenever payment, either of principal or interest, was demanded. Purchasers of such paper look at the form of the paper, the law which authorized it to be issued, and the recorded proceedings on which it is based. When the law was passed authorizing the common council to ratify and affirm the contract with the railroad company, it must have been understood

by the legislature that the bonds were to be received by the company in payment for the stock, and used as a means for borrowing money for the construction of the road, and it could hardly have been expected that the object could be accomplished, if, by the true construction of the act, it contemplated that the bonds should be issued before it was conclusively determined that the requisite number of the legal voters of the city had petitioned the common council. But a much stronger reason why that construction cannot be adopted is, that it would involve an absurdity as it would render the law altogether inoperative, or else it would admit that the bonds might be issued without authority. Whether three-fourths of the legal voters had petitioned or not, was a question of fact; and if not ascertained and conclusively settled before the bonds were issued, it would remain open to future inquiry, and might be determined in the negative; and clearly the common council could not lawfully ratify and affirm the subscription, unless that proportion of the legal voters had petitioned; and without such ratification the bonds would be invalid. Beyond question therefore that construction must be rejected.

"Jurisdiction of the subject-matter on the part of the common council was made to depend upon the petition, as described in the explanatory act, and of necessity there must be some tribunal to determine whether the petitioners, whose names were appended, constituted three-fourths of the legal voters of the city, else the board could not act at all. None other than the

common council, to whom the petition was required to be addressed, is suggested, either in the charter or the explanatory act, and it would be difficult to point out any other sustaining a similar relation to the city so fit to be charged with the inquiry, or one so fully possessed of the necessary means of information to discharge the duty. Adopting the language of this court in the case of *Comrs. of Knox County v. Aspinwall et al.*, 21 How. 544, we are of the opinion that 'This board was one, from its organization and general duties, fit and competent to be the depository of the trust confided to it.' Perfect acquiescence in the decision and action of the board seems to have been manifested by the defendants until the demand was made for the payment of interest on the loan. So far as appears, they never attempted to enjoin the proceedings, but suffered the authority to be executed, the bonds to be issued, and to be delivered to the railroad company, without interference or complaint. When the contract had been ratified and affirmed, and the bonds issued and delivered to the railroad company in exchange for the stock, it was then too late to call in question the fact determined by the common council, and a fortiori it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value." *Bissell v. City of Jeffersonville*, 24 How. 287, 16 L. Ed. 664.

Recital of issuance pursuant to statute.

452. (Ind. 1862.) "The real point in this case, as made by the counsel of the plaintiff in error, and sustained in argument by numerous adjudicated cases, was, that as it is declared in the bonds that they were issued by the board of commissioners of Miami county, by order or resolution, pursuant to the statute authorizing the county to borrow money, passed at a regular meeting of the board, to be used by the Peru & Indianapolis railroad, payable to the company, or bearer, for a loan to the county: that the bona fide holders of the bonds, whether so by indorsement or delivery, had a right to infer that the bonds had been lawfully issued, by which the county of Miami is estopped in a suit for the recovery for the interest, from denying by pleas

that its bonds have been issued to the Peru & Indianapolis railroad, for a loan of money to the county of Miami. We think and adjudge that the recitals in the bonds are conclusive, constituting an estoppel in pais upon the defendants in this suit." A number of cases cited to this proposition. *Moran v. Miami County Comrs.*, 2 Black, 722, 17 L. Ed. 342.

Defense that bonds were issued without compliance with law; unavailing against bona fide holder; recital of issue "in pursuance of acts of assembly" authorizing them.

453. (Pa. 1863.) "The bonds declare on their face that the faith, credit, and property of the county is solemnly pledged, under the authority of certain acts of assembly, and that in pursuance of said acts the bonds were signed by the commissioners of the county. They are on their face complete and perfect, exhibiting no defect in form or substance; and the evidence offered is to show the recitals on the bonds are not true; not that no law exists to authorize their issue, but that the bonds were not made 'in pursuance of the acts of assembly' authorizing them.

"We have decided in the case of *Comrs. of Knox County v. Aspinwall*, 21 How. 539, 16 L. Ed. 735, that where the bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further. The decision of the board of commissioners may not be conclusive in a direct proceeding to inquire into the facts before the rights and interests of other parties had attached; but after the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question." *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548.

Recitals of compliance with legal requirements.

454. (Iowa, 1872.) "The county judge is the officer designated by the statute to decide whether the voters have given the required sanction. He executed and issued the bonds, and the requisite popular sanction is set forth upon their face." Held, that the county was thereby estopped. *Lynde*

v. The County, 16 Wall. 6, 21 L. Ed. 272. **ship v. Long**, 92 U. S. 642, 22 L. Ed. 752.

Bonds showing compliance with law.

455. (Ill. 1872.) "Such a power is frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions, or qualifications, but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any, or all, of those recitals are incorrect will not constitute a defense to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification which it is alleged was not fulfilled." *St. Joseph v. Rogers*, 16 Wall. 644, 21 L. Ed. 328.

Recitals in bonds; certificate of auditor of state; effect of.

456. (Kan. 1875.) Bonds issued by the county commissioners of Labette county, on behalf of Oswego township, for which there was legal authority contained the following recital:

"This bond is executed and issued by virtue of and in accordance with an act of the legislature of the said State of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved Feb. 25, 1870,' and in pursuance of and in accordance with the vote of three-fifths of the legal voters of said township of Oswego, at a special election duly held on the seventeenth day of May, A. D. 1870." They were executed by the proper officers, and with the formalities required by law: they were registered in the office of State auditor and certified by him in accordance with the provisions of an act of the legislature; they were held by a bona fide purchaser for value. Held, that in view of these recitals and other facts stated, the township was estopped from maintaining the defenses pleaded. *Marcy v. Township of Oswego*, 92 U. S. 637, 23 L. Ed. 748; *Humboldt Town-*

The municipal decision; county commissioners' determination; recitals in bonds.

457. (Kan. 1876.) "This statute plainly gives to the board plenary authority to subscribe for stock of a railroad corporation, and to issue county bonds in payment of the subscription, though whether such authority in any case may be exercised or not is made to depend upon the collateral question whether the result of a popular election has indicated an approval of the proposed issue. And the board of commissioners is the tribunal contemplated by the laws to determine whether the contingency of fact has occurred, a determination to be made preparatory to their issuing the county bonds."

"The recitals we have now before us are that the bonds were executed and issued not only in virtue of, but in accordance with, the acts of the legislature, and in pursuance of and in accordance with the vote of a majority of the qualified electors of the county. They are untrue, if the board had not followed the directions of the law, and if there had not been a popular vote at an election, approving the issue of those bonds. The truth or falsehood of the assertion cannot be inquired after here; for, as we have said, the recitals are practically an announcement of the judgment of the board, that all the steps required by the law had been taken. Behind such a recital, as we have seen, a bona fide holder for value paid is bound to look for nothing except legislative authority given for the issue of municipal bonds to railroad companies. He is not required to examine whether the conditions upon which such authority may be exercised have been fulfilled. He may rely upon the decision made by the tribunal selected by the legislature." *Comrs. of Douglas County v. Bolles*, 94 U. S. 104, 24 L. Ed. 46.

The municipal decision; recital of issuance, "by virtue of and in accordance with."

458. (Kan. 1876.) Bonds of Johnson county, Kansas, recited that they were issued, "By virtue of, and in accordance with," the law stated and "In pursuance of and in accordance

with the vote of a majority of the qualified electors of the county of Johnson at an election held on the 6th day of April, 1869."

Referring to the county commissioners and their powers, the court say:

"They were thus constituted a tribunal for the adjustment of all questions touching the subject. They were clothed with the power and charged with the duty to decide them. No appeal or review was provided for. Their issuing the bonds was the reflex and embodiment of their judgment that it was proper to do so. It implies a prior determination to that effect. The fact carries with it this presumption. The bonds recite that they were issued in conformity to law, and in pursuance of the election held on the 6th of April, 1869." *Comrs. of Johnson County v. January*, 94 U. S. 202, 24 L. Ed. 110.

Determination by county officers as to precedent conditions; recitals in bonds.

459. (Kan. 1876.) "Bonds of the kind executed by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are valid commercial instruments, and, if purchased for value in the usual course of business before they are due, give the holder a good title free of prior equities between antecedent parties, to the same extent as in case of bills of exchange and promissory notes. Such a power is frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions, or qualifications; but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity to the prescribed regulations and pursuant to the required conditions and qualifications, proof that any or all of the recitals are incorrect will not constitute a defense to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulations, conditions, or qualifications which it is alleged were not fulfilled." *Comrs. of Marion County v. Clark*, 94 U. S. 278, 24 L. Ed. 59.

Recitals importing compliance with law.

460. (Tex. 1877.) Bonds issued by the city of San Antonio, Texas, contained recitals as follows:

"This debt is authorized by a vote of the electors of the city of San Antonio, taken in accordance with the provisions of an act to incorporate the San Antonio and Mexican Gulf Railroad Company, approved Sept. 5, 1850. Entered and recorded in the office of the city treasurer, and is transferable on delivery. City Hall, City of Antonio, March 1, 1852." Held, "The city is estopped by the recital on the face of the securities to deny its verity. A bona fide purchaser had a right to regard it as true, and was not bound to look further." *San Antonio v. Me-haffy*, 96 U. S. 312, 24 L. Ed. 816.

Recital in bonds that they are issued "in pursuance" of law.

461. (Miss. 1878.) A recital in bonds issued by the board of supervisors of Calhoun county, Mississippi, that they are issued, "In pursuance of" the act authorizing their issue, held in this case to be conclusive against the county, and that a buyer of the bonds need look no further. *Supervisors v. Galbraith*, 99 U. S. 214, 25 L. Ed. 410.

Decision of county judge recited in bonds.

462. (N. Y. 1878.) "The county judge unquestionably had jurisdiction to decide upon the application made by the taxpayers. His judgment until reversed was final. If there were errors, the proceedings should have been brought before a higher court for review by a writ of certiorari, and if need be, the issuing and circulation of the bonds should have been enjoined, subject to the final result of the litigation. The judgment rendered can no more be collaterally attacked in this case than any other judgment of a court of competent jurisdiction rendered with the parties, as in this case, properly before it. The recital in the bonds sets forth the judgment of the county judge, that it was duly rendered, that the bonds were issued pursuant to the statutes referred to, for the object specified in the petition of the taxpayers, and by persons properly appointed and charged by law with the duty of subscribing for the

stock and issuing the bonds to pay for it." *Lyons v. Munson*, 99 U. S. 684, 25 L. Ed. 451.

Recital of issuance in pursuance of law and election.

463. (Ill. 1880.) In pursuance of statutory authority therefore, the electors of Harter township, Illinois, voted a donation to the I. S. Ry. Co., to be raised by a special tax to be assessed and collected in the years 1869, 1870, and 1871. On February 24, 1869, the legislature of Illinois passed an act authorizing certain townships in Wayne and Clay counties (of which Harter township was one), who had voted donations to said railroad company, to issue township bonds for the amounts donated without again submitting the question of issuing the bonds to the voters. The statute also provided that such townships may determine by a vote of their electors whether they will issue such bonds in payment of the donations heretofore voted to said company. At an election held May 20, 1870, in Harter township, the vote was in favor of the issuance of bonds in payment of such donation. May 20, 1870, the bonds were delivered by the township officers to the S. & I. S. Ry. Co., a corporation which had been formed by consolidation, in accordance with the law of Illinois. The bonds were registered by the auditor of State, who certified that all preliminary legal conditions had been fully complied with. The bonds contained recitals that they were issued in pursuance of the authority conferred by the above-mentioned acts and of an election of the legal voters of the township, held on the 10th day of November, 1868. Taxes had been levied and collected to pay interest on the bonds to the year 1877. Held, that the acts relied upon as authority for the issuance of the bonds not being repugnant to the Constitution of Illinois, the township was estopped by the recitals in the bonds to assert that the legal provisions had not been complied with. *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411.

Issued "in pursuance" of authority.

464. (Ill. 1880.) There was legal authority to issue bonds involved in this suit. A disputed question was whether an election had been held and the issuance of the bonds authorized by the

electors as required by law. Held, "The bonds recite that they were issued in pursuance of the authority conferred by those statutes. Such recitals import a compliance with the statute, and the township, according to the uniform decisions of this court, is estopped to assert, as against a bona fide holder for value, that such recitals are untrue. *Buchanan v. Litchfield* (102 U. S. 278), and authorities there cited." *Bonham v. Needles*, 103 U. S. 648, 26 L. Ed. 451.

Recitals of issuance by authority of law and in pursuance of a vote of the people.

465. (Ill. 1880.) "The court finds that the bonds contained recitals averring that they were issued by authority of the act of March 25, 1869, and in pursuance of a vote of the people of said town, which is in effect an averment that the conditions prescribed by said act to be performed before said bonds could be issued had been in fact performed. Whether the conditions precedent had been complied with was a question which was in effect left by the law to the 'corporate authorities' who issued the bonds, to decide. The plaintiff, therefore, being a bona fide holder was not bound to look beyond the legislative act and the recitals in the bonds." *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526.

Recitals as to amount of county debt.

466. (Nebr. 1884.) "The defendant in error is found by the Circuit Court to be a bona fide holder for value. According to repeated decisions of this court, being such, he was not bound to go behind the law and the recital of the bonds to inquire into the amount of the county indebtedness. *Marcy v. Township of Oswego*, 92 U. S. 637; *Humbolt Township v. Long*, id. 642; *Wilson v. Salamanca*, id. 499." *Sherman County v. Simons*, 109 U. S. 735, 3 Sup. Ct. Rep. 502, 27 L. Ed. 1093.

Doctrine of estoppel by recitals discussed.

467. (Ohio, 1884.) "The facts which a municipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a bona fide holder, to question, in face of a recital in the bonds of their existence, were those connected with or

growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; not merely for themselves, as the ground of their own action, in issuing the bonds, but equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it. Had the statutes of Ohio conferred upon a township in Delaware county authority to make a subscription to the stock of this company, upon the approval of the voters at an election previously held, then a recital by its proper officers, such as is found in the bonds in suit, would have estopped the township from proving that no election was in fact held, or that the election was not called and conducted in the mode prescribed by law; for in such case it would be clear that the law had referred to the officers of the township not only the ascertainment, but the decision of the facts involved in the mode of exercising the power granted. But in this case, as we have seen, power in townships to subscribe did not come into existence, that is, did not exist, except where the county commissioners had not been authorized to make a subscription."

"Porter township is estopped by the recitals in the bonds from saying that no township election was held, or that it was not called and conducted in the particular mode required by law. But it is not estopped to show that it was without legislative authority to order the election of August 30, 1851, and to issue the bonds in suit. The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals; but the power existing, the municipality may be estopped by recitals to prove irregularities in the exercise of that power; or, when the law prescribes conditions upon the exercise of the power granted, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will also be estopped by recitals which import such performance." *Northern Bank of Toledo v. Porter Township Trustees*, 110 U. S.

608, 4 Sup. Ct. Rep. 254, 28 L. Ed. 258.

Estoppel to show issue in excess of statutory limit.

468. (Mo. 1884.) "In *Marcy v. Township of Oswego*, 92 U. S. 637, and *Humbolt Township v. Long*, id. 642, followed in, *Wilson v. Salamanca*, 99 U. S. 499, it was expressly decided that municipal bonds were not invalid in the hands of a bona fide holder, by reason of their having been voted and issued in excess of the statutory limit, if the recitals imported a valid issue. It is an admitted fact in this case that McKenzie, the defendant in error, is a bona fide holder for value of the coupons sued on, and the recitals, which are almost in the exact language of those in *Wilson v. Salamanca*, supra, imply authority for the issue of the bonds from which they were cut. Consequently, in this case, the excessive issue is no defense." *County of Dallas v. McKenzie*, 110 U. S. 686, 4 Sup. Ct. Rep. 184, 28 L. Ed. 285.

Statutory authority; recitals in bonds.

469. (Miss. 1884.) In this case the defense to the bonds in suit rested mainly on the ground that the subscription to the stock of a railroad company for which they were issued was without previous legislative authority conferred in conformity with the Constitution of Mississippi. Statutes on the subject examined and held to confer such authority.

"Under the acts in question, assuming them to be constitutional, the county had authority, upon certain conditions, to make a subscription to the capital stock of the Grenada, Houston & Eastern Railroad Company, now the Vicksburg & Nashville Railroad Company, and its board of supervisors was invested with power to determine whether those conditions were performed, and, upon their being performed, to issue bonds in payment of such subscription. According to the settled doctrines of this court, the county is estopped, as against the plaintiffs, to say that the conditions were not duly performed; for, the recitals in the bonds import that they were issued in pursuance of the acts of 1860 and 1871, and in obedience to a vote at an election held in accordance with the provisions of said acts." *Grenada County Supervisors*

v. Brodgen, 112 U. S. 261, 5 Sup. Ct. Rep. 125, 28 L. Ed. 704.

Recital referring to wrong act, but showing compliance with proper act; estoppel by recitals.

470. (Kan. 1885.) "The bond recites the wrong act, but if that part of the recital be rejected, there remains the statement, that the bond 'is executed and issued' 'in pursuance to the vote of the electors of Anderson county, of September 13, 1869.' The act of 1869 provides, that when the assent of a majority of those voting at the election, is given to the subscription to the stock, the county commissioners shall make the subscription, and shall pay for it, and for the stock thereby agreed to be taken, by issuing to the company the bonds of the county. The provision of section 51 is, 'that when such assent shall have been given' it shall be the duty of the county commissioners to make the subscription. What is the meaning of the words 'such assent?' They mean the assent of the prescribed majority, as the result of an election held in pursuance of such notice as the act prescribes. The county commissioners were the persons authorized by the act to ascertain and determine whether 'such assent' had been given; and necessarily so, because on the ascertainment by them of the fact of 'such assent,' they were charged with 'the duty'—that is the language—of making the subscription, and the duty of issuing the bonds. They were equally charged with the duty of ascertaining the fact of the assent."

"When the bonds were delivered to the company, the transaction was complete, and the bonds, as they afterwards passed to bona fide holders, passed free from any impairment by reason of any dealing by the board with the stock subscribed for, to which the county became entitled by the issuing and delivery of the bonds. The board may have committed an improper act in parting with the stock, but that is no concern of a bona fide holder of the bonds or coupons." *Anderson County Comrs. v. Beal*, 113 U. S. 227, 5 Sup. Ct. Rep. 433, 28 L. Ed. 966.

Grounds of estoppel.

471. (N. Y. 1885.) "The ground of the estoppel is, that the officers issuing the bonds and inserting the re-

citals are agents of the municipality, empowered to determine whether the statute has been followed, and thus bind the municipality by their determination. See of the late cases on this point, *Northern Bank of Toledo v. Porter Township Trustees*, 110 U. S. 608, and *Dixon County v. Field*, 111 U. S. 83." *Merchants' Bank v. Bergen County*, 115 U. S. 384, 6 Sup. Ct. Rep. 88, 29 L. Ed. 430.

Recitals in bonds of compliance with conditions, etc.; determination of compliance by officers having authority; estoppel.

472. (Ill. 1886.) Railroad-aid bonds were issued by the town of Oregon, Illinois, reciting that they were issued "under authority of" the act of March 30, 1869, giving its title, and that the sixty bonds of the issue, amounting to \$50,000 "are the only bonds issued by said town of Oregon under and by virtue of said act." Held, in an action by a bona fide holder of the bonds that by such recital, made by the officers of the town authorized to determine the facts so recited, the town was concluded and estopped from showing as a defense that the condition upon which the electors, by their vote, authorized the issue of the bonds, had not been complied with, whether the question is to be regarded as arising under the provisions of the Constitution or of the statute of the State.

"Within the numerous decisions by this court on the subject, the supervisor and the town clerk, they being named in the statute as the officers to sign the bonds, and the 'corporate authorities' to act for the town in issuing them to the company, were the persons entrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a bona fide holder, that the conditions prescribed by the popular vote were not complied with." *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. Rep. 124, 30 L. Ed. 323.

Determination by county commissioners as to performance of conditions.

473. (Mo. 1888.) "The County Court having been designated by the statute as the proper authority to determine that the conditions existed

which authorized the making of the subscription, to be followed by the issuing of the bonds, the fact of the issue of the bonds by the County Court, under its seal, with the recitals contained in the bonds and the other facts above stated, estop the county from urging, as against a bona fide holder of the bonds and coupons, the existence of any mere irregularity in the making of the subscription or the issuing of the bonds." *Livingston County, Missouri, v. First Nat. Bank of Portsmouth, N. H.*, 128 U. S. 102, 9 Sup. Ct. Rep. 18, 32 L. Ed. 359.

Recitals of issuance; "in pursuance of, and in accordance with."

474. (Kan. 1890.) Bridge bonds issued by Comanche county, Kansas, recited that they were, "Issued in pursuance of and in accordance with" an act mentioned which authorized such bonds and also "In accordance with the vote of a majority of qualified electors of said county of Comanche, at a special election duly and regularly held therefor." Held, that these recitals were sufficient to validate the bonds in the hands of a bona fide holder. *Comanche County v. Lewis*, 133 U. S. 198, 10 Sup. Ct. Rep. 286, 33 L. Ed. 604.

Recitals in bonds importing compliance with law.

475. (N. J. 1890.) Bonds of Bernards township, New Jersey, were issued, containing a recital that they were "Issued on the faith and credit of said township in pursuance of an act entitled 'An act to authorize certain towns in the counties of Somerset, Morris, Essex and Union to issue bonds and take stock in the Passaic Valley and Peapack Railroad Company,' approved April 9, 1868."

"It is conceded that the commissioners were duly appointed; that the issue of bonds was not in excess of the amount authorized by the statute; that a paper purporting to contain the consent of the requisite number of taxpayers, duly verified by the affidavit of the township assessor, was filed in the office of the clerk of the county; and that the plaintiffs were bona fide holders. But the contention is that the consent roll did not in fact contain the requisite number of taxpayers, and that the affidavit of the assessor was not true; also that the commissioners did not borrow any

money on the bonds, but disposed of them without lawful consideration. The Circuit Court held that these defenses were unavailing against bona fide holders of the bonds; and with that ruling we concur." *Bernards Township v. Morrison*, 133 U. S. 523, 10 Sup. Ct. Rep. 333, 33 L. Ed. 766.

Constitutional debt limitation; estoppel by recitals.

476. (Colo. 1892.) Bonds were issued by Chaffee county, Colorado, for the purpose of funding its floating indebtedness. In a suit against the county on interest coupons from such bonds the county set up defenses:

"That the bonds had not been authorized by a vote of the qualified voters of the county, and no bonds had been authorized to be exchanged for the warrants of the county, and the board, therefore, never had any jurisdiction to issue them; that the bonds, and each of them, were issued in violation of section 6, article 11, of the Constitution of the State, and the debt which they assumed to fund was contracted in violation of said provision of the Constitution; and that the bonds were issued by the board of county commissioners without any consideration valid in law."

The bonds contained a recital, that "the total amount of this issue does not exceed the limit prescribed by the Constitution of the State of Colorado," but did not show upon their face how many bonds were issued or the amount. The county was held to be estopped by this recital.

"In our opinion, these two features are of vital importance in distinguishing this case from *Lake County v. Graham*, and *Dixon County v. Field*, and are sufficient to operate as an estoppel against the county. Of course, the purchaser of bonds in open market was bound to take notice of the constitutional limitation on the county with respect to indebtedness which it might incur. But when, upon the face of the bonds, there was an express recital that that limitation had not been passed and the bonds themselves did not show that it had, he was bound to look no further. An examination of any particular bond would not disclose, as it would in the *Lake County* case and in *Dixon County v. Field*, that, as a matter of fact, the constitutional limitation had been exceeded, in the issue of the series of

bonds. The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment-roll whether the county had exceeded its power, under the Constitution, in the premises. True, if a purchaser had seen the whole issue of each series of bonds and then compared it with the assessment-roll, he might have been able to discover whether the issue exceeded the amount of indebtedness limited by the Constitution. But that is not the test to apply to a transaction of this nature. It is not supposed that any one person would purchase all of the bonds at one time, as that is not the usual course of business of this kind. The test is, What does each individual bond disclose? If the face of one of the bonds had disclosed that, as a matter of fact, the recital in it, with respect to the constitutional limitation, was false, of course the county would not be bound by that recital, and would not be estopped from pleading the invalidity of the bonds in this particular. Such was the case in *Lake County v. Graham*, and *Dixon County v. Field*. But that is not this case. Here, by virtue of the statute under which the bonds were issued, the county commissioners were to determine the amount to be issued, which was not to exceed the total amount of the indebtedness at the date of the first publication of the notice requesting the holders of county warrants to exchange their warrants for bonds at par. The statute, in terms, gave to the commissioners the determination of a fact, that is, whether the issue of bonds was in accordance with the Constitution of the State, and the statute under which they were issued, and required them to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination has been made, and that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, under the law, estops the county from saying that it is untrue. *Town of Coloma v. Faves*, 92 U. S. 484; *Town of Venice v. Murdock*, id. 494; *Marcy v. Town-*

ship of Oswego, id. 637; *Wilson v. Salamanca*, 99 id. 499; *Buchanan v. Litchfield*, 102 id. 278; *Northern Bank v. Porter Township*, 110 id. 608." *Chaffee County v. Potter*, 142 U. S. 355, 12 Sup. Ct. Rep. 216, 35 L. Ed. 1040.

Subscription to railroad stock; irregular issue and exchange of bonds; rights of bona fide holder; registration.

477. (Ill. 1893.) The laws of Illinois authorized subscriptions by municipal corporations of the State to the stock of railroad companies, and the issuance of bonds in payment of the same. The city of Cairo subscribed for stock of a railroad company, received certificates of stock for \$100,000, and issued its bonds to the company in that amount, but soon thereafter transferred its stock to the president of the company and received \$5,000 of its own bonds in exchange therefor. The bonds on their face showed "that they were issued in payment of stock in the railroad company, and recite that they were issued in pursuance of an ordinance of the city council, and authorized by a vote of the citizens, and in accordance with the laws of the State; and they were duly registered by the auditor of the State, and his certificate of registry was indorsed on the back." The validity of the bonds was contested on the ground that the transaction was a donation to the railroad company and unauthorized. Held, in favor of a bona fide holder of the bonds, that they were valid in the hands of such holder.

"Can it be that a purchaser, with this evidence before him, is not protected by the statement upon the face of the bonds that they were issued in payment of a subscription? Is it his duty to examine all the proceedings, to see whether that which was a subscription in the first instance, was called a subscription all the way through, and was named as a subscription in the bonds, had not been transformed by some action of the city council into a donation? It will be borne in mind that it is not a matter of law, but of fact, in respect to which an estoppel is urged against the city by virtue of the recitals and the fact of registry." *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. Rep. 803, 37 L. Ed. 673.

Estoppel by recitals in bonds.

478. (N. Y. 1895.) "But further, in view of the recitals in the bonds, are these questions open for inquiry? Ample authority was given by the statutes of the State referred to. Whether the various steps were taken which in this particular case justified the issue of the bonds was a question of fact; and when the bonds on their face recite that those steps have been taken it is the settled rule of this court that in an action brought by a bona fide holder the municipality is estopped from showing the contrary. See the many cases commencing with *Knox County v. Aspinwall*, 21 How. 539, and ending with *Citizens' Savings Association v. Perry County*, 156 U. S. 692." *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. Rep. 954, 39 L. Ed. 996.

Conditions precedent; recitals of compliance; determination of fact of compliance by officers.

479. (Ky. 1898.) "The only inquiry is whether the conditions prescribed in the statute have been fully complied with, and, if not, whether the county is in a position to avail itself of the noncompliance. The statute in terms authorizes the issue of negotiable bonds. The bonds are negotiable, and issued by the proper county officers; carry on their face recitals that they have 'been issued pursuant to the authority conferred' by an act of the legislature, which is named, and 'pursuant to an order entered by the county judge of said county in conformity with said act subscribing in behalf of said county for the capital stock' of the railroad company. By a long series of decisions such recitals are held conclusive in favor of a bona fide holder of bonds that precedent conditions prescribed by statute and subject to the determination of those county officers have been fully complied with. For instance, whether an election has been held, whether at such an election a majority voted in favor of the issue of bonds, whether the terms of the subscription have been complied with, and matters of a kindred nature which either expressly or by necessary implication are to be determined in the first instance by the officers of the county, will in favor of a bona fide holder be conclusively presumed to have been fully performed, provided the bonds contain recitals similar to those in the bonds

before us." *Provident Life & Trust Co. v. Mercer County*, 170 U. S. 593, 18 Sup. Ct. Rep. 788, 42 L. Ed. 1156.

Recitals importing compliance with law, and that constitutional debt limit has not been exceeded; estoppel.

480. (Colo. 1899.) "We have seen that the bonds to which were attached the coupons in suit recited that they were issued by the board of county commissioners 'in exchange at par for valid floating indebtedness of the county outstanding prior to September 2, 1882, under and by virtue of and in full conformity with the provisions of an act of the general assembly of the State of Colorado, entitled 'An act to enable the several counties of the State to fund their floating indebtedness,' approved February 21, 1881; that 'all the requirements of law have been fully complied with by the proper officers in the issuing of this bond;' that the total amount of the issue did 'not exceed the limit prescribed by the Constitution of the State of Colorado,' and that such issue had been authorized by a vote of a majority of the duly qualified electors of the county, voting on the question at a general election duly held in the county on the 7th day of November, 1882. Do such recitals estop the county from asserting against a bona fide holder for value, that the bonds so issued created an indebtedness in excess of the limit prescribed by the Constitution of Colorado? An answer to this question can be found in former decisions of this court." Held, that as, under the law, the county commissioners were authorized to determine whether the proposed issue of bonds would in fact exceed the limit prescribed by the Constitution and the statute, "The recital in the bonds to the effect that such determination had been made and that the constitutional limitation had not been exceeded, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, estopped the county, under the law, from saying that the recital was not true."

"It is insisted with much earnestness that the principles we have announced render it impossible for a State by a constitutional provision to guard against excessive municipal indebtedness. By no means. If a State

Constitution, in fixing a limit for indebtedness of that character, should prescribe a definite rule or test for determining whether that limit has already been exceeded or is being exceeded by any particular issue of bonds, all who purchase such bonds would do so subject to that rule or test, whatever might be the hardship in the case of those who purchase them in the open market in good faith. Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in cases of nonnegotiable instruments. But for reasons that every one understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities." *Gunnison County Comrs. v. Rollins*, 173 U. S. 255, 19 Sup. Ct. Rep. 390, 43 L. Ed. 689.

Recitals importing compliance with law; estoppel.

481. (Kan. 1893.) "The bonds in controversy are now held by a corporation which purchased them for value on the faith of their recitals, and without any actual notice of the matter relied upon as a defense, i. e., that the original articles of association of the Denver, Memphis & Atlantic Railway, declared that the company intended to construct and operate a narrow-gauge railroad. The bonds do not show on their face that the railway company is a narrow-gauge road, or that it was organized to build a road of that character."

"Furthermore, the bonds contain recitals showing that they were issued under laws existing in the State of Kansas, which conferred upon the county ample power to issue bonds for the purpose for which they purport to have been issued."

"We hold, therefore, that, as there was nothing on the face of the bonds to indicate that the Denver, Memphis & Atlantic Railway was only authorized to construct a narrow-gauge railroad, a purchaser of the bonds was not affected with notice of that fact, and furthermore, that the county is estopped from pleading such fact as a defense, in view of the recital, that everything had been 'complied with and performed,' which was necessary

to the lawful issue of the bonds." *Board of Comrs. of Kingman County v. Cornell University*, 6 C. C. A. 296, 57 Fed. 149.

Recitals in bonds of purpose of issue.

482. (Mich. 1893.) Refunding bonds issued by the city of Cadillac, Michigan, recited that they were issued "By virtue of, and in accordance with, an ordinance duly passed by the council of said city, and approved by the mayor thereof on the ninth day of May, A. D. 1888, entitled 'An ordinance authorizing new bonds of the city of Cadillac to be issued in place of, and to extend the time of payment of, former bonds of said city, falling due,'" and contained further recitals importing full compliance with law.

"It seems to us that the representations made on the face of the bonds estop the city, as against a bona fide holder, from disputing the fact that these bonds were issued to take up old bonds falling due."

"The recitals in the new bonds, as to the fact of 'old bonds falling due' and that the new bonds were issued to take up the old, would well lull an intending purchaser into security. The defense it might have made against the old bonds it elected not to make. It should not now be permitted to set up as against a bona fide holder of its refunding bonds." *City of Cadillac v. Woonsocket Inst. for Savings*, 7 C. C. A. 574, 58 Fed. 935; *Ashley v. Board of Supervisors*, 8 C. C. A. 455, 60 Fed. 55.

Misappropriation of proceeds of bonds; estoppel to show unlawful purpose of issue; recital that conditions imposed by constitution have been complied with; levy and collection of tax; when recitals create an estoppel; rules stated; irregular exercise of existing authority distinguished from absence of authority.

483. (S. Dak. 1894.) The board of education of the city of Huron, South Dakota, in pursuance of legal authority, issued \$60,000 of its negotiable bonds, containing a recital that they were issued for a lawful purpose, namely, to raise funds for the purchase of a school site and for the erection of a school building thereon.

"It is no defense to these bonds, against innocent purchasers for value,

before maturity, that the defendant (the board of education) loaned \$59,500 of the proceeds of the sale of them to the city of Huron for city warrants that were never paid, and that cannot be legally enforced, so that it has actually realized but \$500 from the sale of its bonds. That a municipal corporation has given away or squandered the proceeds of negotiable securities which it placed upon the market cannot affect the rights of bona fide purchasers, who had no knowledge of, nor part in, the gift or waste. They are in no way responsible for the wise and economical use by the corporation of the funds it borrows."

"Nor is it any defense to such bonds, as against bona fide purchasers, that the citizens and officers of a municipal corporation, with the intention to use the proceeds of the bonds for an unlawful purpose, took the necessary steps to issue them for a lawful purpose, and then appropriated the proceeds to the unlawful purpose. Corporations are as strongly bound to an adherence to truth in their dealings with mankind as are individuals, and they cannot, by their representations or silence, induce others to part with their money or property, and then repudiate the obligations for which the money was expended, and which their statements represented to be valid."

"The corporation is estopped to deny that these bonds were issued to raise money for a school site and school building."

Among other things, the bonds recite: "That all conditions and things required to be done, precedent to and in the issuing of said bonds, have duly happened and been performed in regular and due form as required by law." Held, that the defendant is estopped by this recital from showing that, at or before the time of the issuing of the bonds, it did not provide for the collection of an annual tax sufficient to pay the interest and also the principal, when due, as required by the Constitution of South Dakota, whether such requirement be regarded as mandatory or simply directory.

"One of the conditions and things required to be done, precedent to and in the issuing of these bonds, was to

provide, in accordance with this constitutional requirement, for the collection of the annual tax to pay the principal and interest of the bonds. The defendant certified on the face of these bonds that this thing had been done. On this certificate the present holders bought the bonds."

"An ordinance or resolution of this board, passed at or before the issuance of the bonds, providing for the collection of such an annual tax until the bonds and coupons were paid, would have complied with the provision of the Constitution. If this was not passed, it was not from lack of power in the board, but from a failure on its part to exercise the power with which it was vested in the manner provided by the Constitution. It is this difference between the inadequate exercise of ample power and the total absence of power to be exercised that widely separates this case from *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315 (28 L. Ed. 360); *Northern Bank of Toledo v. Porter Township Trustees*, 110 U. S. 608, 4 Sup. Ct. Rep. 254 (28 L. Ed. 258); *McClure v. Township of Oxford*, 94 U. S. 429 (24 L. Ed. 129); *Lake County v. Graham*, 130 U. S. 674, 9 Sup. Ct. Rep. 654 (32 L. Ed. 1065); *Nesbit v. Independent Dist.*, 144 U. S. 610, 617, 12 Sup. Ct. Rep. 746 (36 L. Ed. 562); *Sutliff v. Comrs.*, 147 U. S. 230, 235, 13 Sup. Ct. Rep. 318 (37 L. Ed. 145), and *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. Rep. 71 (37 L. Ed. 1044), cited by counsel for defendant."

"Upon reason and authority, therefore, our conclusion is that an estoppel may arise in a proper case upon a recital that an act has been performed which was required by a Constitution, as well as upon a recital of the performance of an act required by statute.

"From the decisions to which we have referred, we think the following rules are fairly deducible:

"Recitals in municipal bonds, by the representative body that issues them, to the effect that all the requirements of the laws with reference to their issue have been complied with, will not estop the municipality from proving, as against a bona fide purchaser, that the representative body had no power to issue them, where no act of the representative or

constituent body could make the issue lawful at the time it was made, and this fact appears from the Constitution and statute under which the bonds were issued, the public records referred to therein, and the bonds the purchaser buys. *Dixon County v. Field*, *supra*, and cases cited thereunder.

"Such a recital may constitute an estoppel in favor of a bona fide purchaser, even where the body that issued the bonds had no power to issue them, and could not, by any act of its own or of its constituent body, make a lawful issue of bonds, if that fact does not appear from the bonds the purchaser buys, the Constitution and statutes under which they were issued, and the public records referred to therein. *Chaffee County v. Potter*, *supra* (142 U. S. 355, 12 Sup. Ct. Rep. 216, 35 L. Ed. 1040).

"Another rule that is established by a long line of decisions of the Supreme Court is that:

"Where the municipal body has lawful authority to issue bonds or negotiable securities, dependent only upon the adoption of certain preliminary proceedings, and the adoption of those preliminary proceedings is certified on the face of the bonds by the body to which the law intrusts the power, and upon which it imposes the duty, to ascertain, determine, and certify this fact before or at the time of issuing the bonds, such a certificate will estop the municipality, as against a bona fide purchaser of the bonds, from proving its falsity to defeat them." *National Life Ins. Co. of Montpelier v. Board of Education of City of Huron*, 10 C. C. A. 637, 62 Fed. 778.

Recitals of a legal purpose binding.

484. (Kan. 1895.) "May a municipal corporation make a false certificate and official record that its negotiable bonds were issued for a lawful purpose, and, after they have been bought by innocent purchasers for value in reliance upon this certificate or record, defeat them by the plea that the certificate and record were false, and that the bonds were in fact issued for an unlawful purpose? This is the question presented by the first objection to this judgment. It is that, although the official record of the meetings of

the township board that issued these bonds, and the recitals made by that board in the bonds themselves, show that they were issued for the lawful purpose of refunding an outstanding indebtedness of the township in accordance with the provisions of sections 1, 2, and 3, of chapter 50 of the Laws of Kansas of 1879, yet they were in fact issued for the unlawful purpose of procuring the erection of a sugar factory."

"It is no defense for this township, against the action of an innocent purchaser who has invested his money in these bonds, that the township board, and the voters of the township who authorized the board to issue them, knew that the township had no indebtedness to refund, and that all these records and declarations were false, and were made to evade the law. Against a bona fide purchaser the township is estopped to deny that these bonds were issued to refund its outstanding indebtedness." *West Plains Township, Meade County. v. Sage et al.*, 16 C. C. A. 553, 69 Fed. 943.

Recitals importing compliance with law.

485. (Ill. 1896.) The bonds here in question were put upon the market before the case of *Town of Eagle v. Kohn*, 84 Ill. 292, was decided, and, under the decisions of the Supreme Court of the United States, the rights of a good faith purchaser are not left in doubt. The recitals are indisputable proof of the facts essential to the validity of the bonds. *Town of Coloma v. Eaves*, 92 U. S. 484; *Insurance Co. v. Bruce*, 105 id. 328; *Pana v. Bowler*, 107 id. 529, 2 Sup. Ct. Rep. 704; *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. Rep. 124; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 9 Sup. Ct. Rep. 159; *Citizens' Savings & Loan Assn. v. Perry County*, 156 U. S. 692, 15 Sup. Ct. Rep. 547. If the facts were as the recitals show they were, there was complete authority of law for the execution of the bonds, and, as against an innocent purchaser, evidence that the facts were different must be rejected or disregarded." *Wesson v. Saline County; Society for Savings v. Same*, 20 C. C. A. 227, 73 Fed. 917; *Ashman v. Pulaski County*, 20 C. C. A. 232, 73 Fed. 927.

Purchaser of funding bonds not required to know that the debt refunded was valid.

486. (Colo. 1897.) "A purchaser of such securities for value, in the open market, can neither be expected nor required to examine the warrants issued for the original indebtedness, with a view of ascertaining when the debt was contracted, especially when the bonds contain such explicit representations as the bonds in suit contain. No case, we believe, has ever imposed a burden of that kind upon the bondholder." *E. H. Rollins & Sons v. Board of Comrs. of Gunnison County, Colo.*, 26 C. C. A. 91, 80 Fed. 692.

Estoppel by recital in bonds as to debt limit.

487. (Kan. 1897.) Plaintiffs were innocent purchasers of the bonds for value. "The bonds showed on their face that the total issue was less than \$78,750, and, not having actual knowledge of any other or greater indebtedness, the plaintiffs were entitled to rely on the recital, which each bond contained, 'that the total amount of this issue of bonds, together with all other outstanding indebtedness of said board of education,' does not exceed the statutory or constitutional limitation." *Rathbone v. Board of Comrs. of Kiowa County, Kan.*, 27 C. C. A. 477, 83 Fed. 125.

Refunding bonds; recital of issuance in conformity with law; estoppel to show invalidity of debt refunded.

488 (Kan. 1897.) The bonds involved in this suit were issued under authority of the act of 1879 of Kansas, and contained the following recital: "This bond is one of a series of bonds of like amount, tenor, and effect, executed and issued by the county commissioners of said Kiowa county to refund its matured and maturing indebtedness heretofore legally created by said county, and in accordance with an act of the legislature of the State of Kansas, entitled 'An act to enable counties, municipal corporations, the board of education of any city, and school districts, to refund their indebtedness,' approved March 8, 1879, and it is hereby certified that the total amount of this issue of bonds does not exceed the actual amount of the outstanding in-

debtedness of said county, and that all the requirements of the provisions of the foregoing act have been strictly complied with in issuing this bond."

The case was decided upon demurrer to the answer of the county, and judgment rendered for the plaintiff.

"It is no defense to an action brought by an innocent purchaser who has invested his money in municipal bonds containing such recitals to allege that the 'railroad aid bonds,' which constituted a part of the indebtedness refunded, were void to the knowledge of all persons whomsoever, or that the county commissioners knew that the county had no matured or maturing indebtedness to refund. This recital was evidently made for the very purpose of enabling the county to negotiate and sell these bonds on the market. The statement on the face of the bonds that they were issued to refund the matured or maturing indebtedness of the county pursuant to the authority conferred upon the county by the act of March 8, 1879; that the total amount did not exceed the actual amount of the outstanding indebtedness of the county, and that all the provisions of law in relation to the issuance of said bonds had been complied with, fairly imported that nothing remained to be done in order to make the bonds binding obligations upon the county in the hands of bona fide purchasers. It was upon the statements contained in the recital upon the face of these bonds, doubtless, that the plaintiff was induced to purchase them. He had a right to rely upon them as true, and by every principle of justice the county is estopped to deny that the bonds were issued to refund the matured and maturing indebtedness of the county. These bonds, containing the recitals above mentioned, were made by the county commissioners, the officers of the county, intrusted and clothed with full power, under the statute, to determine whether or not there was a matured or maturing indebtedness, and the amount thereof. This question has been so often decided by the courts that it would serve no useful purpose to here repeat the reasoning on the question." Several cases cited. *Board of Comrs. of Kiowa County, Kan., v. Howard*, 27 C. C. A. 531, 83 Fed. 296.

Unlawful use by corporation of proceeds of bonds; recitals of lawful purpose; estoppel.

489. (S. Dak. 1898.) "The fact that a municipal corporation has diverted the proceeds of its negotiable securities from the lawful purpose for which they appear on their face to have been issued to an unlawful purpose is no defense to an action upon them by an innocent purchaser who had no knowledge of or part in the diversion or waste." *City of Huron v. Second Ward Savings Bank*, 30 C. C. A. 38, 86 Fed. 272.

Recitals of issuance in pursuance of law.

490. (S. Car. 1898.) "This brings us to the consideration of the real question in the case, and that is whether the township of Ninety-Six is not estopped by the recital upon the face of the bonds. It is recited upon their face that the county commissioners issued the bonds in pursuance of an act of the general assembly of South Carolina passed in 1882 and amended in 1885, which act and the amendment to it did 'empower certain counties and townships to issue bonds in subscription to the common stock of the Greenville & Port Royal Railroad Company, and that said township has subscribed for twenty thousand eight hundred dollars of the common stock of said company. In consideration thereof, and in conformity with the provision of said act, this bond, being one with others aggregating twenty thousand eight hundred dollars, is issued by the board of county commissioners for Abbeville county, State of South Carolina, who, in testimony whereof, and by authority of said act, have officially executed this bond, and caused the same to be countersigned by their clerk, and the seal of the said county of Abbeville to be hereunto affixed,' etc. It appears further from the evidence that the plaintiff became the purchaser of thirty-seven bonds, numbering from one to thirty-seven, both inclusive, and that he paid full value for them, without notice of any defect or irregularity in their issue, and that he was, at the commencement of this action and at the date of the judgment, the legal holder and owner thereof. It will be observed from the inspection of these bonds that their recitals show upon the face of the

bond a compliance with the law under which they were issued. The purchaser had a right to assume that all the conditions of the law were complied with authorizing the issue of the bonds. The question whether they were issued in compliance with the law was a question that properly belonged to the authorities who were authorized by the acts of the legislature to issue the bonds. There is no evidence in this case that at the time of the sale of these bonds to the holder he had any notice whatever of any irregularity concerning them, and, such being the case, and being a purchaser without notice of irregularity and for a valuable consideration, we hold that the township of Ninety-Six was estopped from setting up a defense of the character set out in its pleadings." *Township of Ninety-Six, Abbeville County, S. Car., v. Folsom*, 30 C. C. A. 657, 87 Fed. 304.

Recital importing compliance with law and resolution of council.

491. (Minn. 1898.) Bonds issued by the city of South St. Paul contained the following recital:

"This bond is one of a series of seventy-five bonds, issued to aid in building a bridge, and authorized by act of the legislature of the State of Minnesota, at a session thereof held in the year 1891, and in compliance with a resolution of the common council of the city of South St. Paul, at a regular meeting thereof, held May 28, 1891; and, to the payment of this bond and interest thereon, the faith and credit of the city of South St. Paul are irrevocably pledged." Held, that the city was estopped by this recital as against a bona fide holder from asserting that the bonds were invalid for a number of reasons urged.

"The bonds were signed by the mayor of the city of South St. Paul. They were attested by the city clerk, countersigned by the city comptroller, and bore the imprint of the corporate seal. It was a part of the official duty of these officers to execute and deliver the bonds and, before doing so, to ascertain and determine whether all of the antecedent conditions prescribed by the act under which they were issued, such as the adoption of a proposal or plan, the holding of a lawful election, and the passage of proper resolutions or ordinances, had been duly performed."

A number of cases cited. *City of South St. Paul v. Lamprecht Bros. Co.*, 31 C. C. A. 585, 88 Fed. 449.

Bonds refunding void warrants; recital of issuance to "fund floating indebtedness;" of compliance with conditions; estoppel to show invalidity of debt refunded; or debt in excess of organic territorial act; presumption that legal method pursued.

402. (S. Dak. 1898.) The city of Huron was authorized by its charter "to borrow money and for that purpose to issue bonds of the city in such denominations, for such length of time, not to exceed twenty years, and bearing such rate of interest, not to exceed seven per cent. per annum, as the city council may deem best." The city issued its bonds, purporting to be in pursuance of that authority, and reciting that they were "issued for the purpose of funding the floating indebtedness of the city of Huron." The bonds after their issuance were purchased in the open market by the defendant in error, for value, without any knowledge or notice of any illegality. Held, that the city was estopped from showing that the bonds were in fact issued, and the proceeds used, for an illegal purpose, and that the holder thereof was entitled to recover thereon from the city.

"The city council was vested with the power and charged with the duty 'to admit and allow all just claims against the city, * * * and provide for the payment of the expenses and indebtedness of the corporation,' and it was authorized 'to borrow money, and for that purpose to issue the bonds of the city.' It issued these bonds pursuant to the vote of the qualified electors of that city. It wrote upon the face of each of them the words 'issued for the purpose of funding the floating indebtedness of the city of Huron,' and sent them forth into the commercial world, to be sold upon this statement, when every officer of that city, every member of its city council, and many, if not all, of its citizens, knew that these bonds were issued to pay void warrants which evidenced no debt. Why did not the council write the truth into these bonds? Why did it not write 'issued for the purpose of paying the void warrants put forth by the city

of Huron to elect itself the capital of the State?' The reason is obvious. The truth would not have persuaded investors to purchase the bonds."

"A municipal corporation is estopped from defending an action by an innocent purchaser to collect its negotiable bonds which recite that they were issued for the purpose of funding the bonds, warrants, or floating debt of the corporation, either on the ground that the warrants or bonds which they were issued to satisfy were void, or that the apparent debt which they were issued to pay was fictitious," citing cases.

"Another proposition which is zealously argued in this case is that these bonds are void because they create a debt in excess of the limitation prescribed by the organic act of the Territory of Dakota. It is conceded that, at the time these bonds were issued, the indebtedness of the city of Huron already exceeded the limitation prescribed by that act. But, as we have already shown, the warrants which these bonds refunded must, for all the purposes of this case, be deemed to have evidenced a just debt of the city, and bonds which are issued to fund a valid indebtedness neither create any debt nor increase the debt of the municipality which issues them. They merely change the form of an existing indebtedness," citing cases.

"The recitals of the officers of a municipality who are invested with the authority to perform a precedent condition to the issue of negotiable bonds, or with authority to determine when that condition has been performed that the bonds have been issued 'in pursuance of' or 'in conformity with,' or 'by virtue of,' or 'by authority of' the statute, preclude inquiry, as against an innocent purchaser for value, as to whether or not the precedent conditions had been performed before the bonds were issued," citing cases.

"There was a legal method by which these bonds could have been issued by the city. The city certified that they had been issued according to law. If, upon any theory, the bonds of a municipality can be valid, an innocent purchaser has the right to presume that they are so, and that the recitals in them are true; and, after he has completed his purchase, that presumption is conclusive upon the

corporation." *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272.

To the same effect;

(Kan. 1898), *Board of Comrs. of Seward County, Kan., v. Aetna Life Ins. Co.*, 32 C. C. A. 585, 90 Fed. 222.

Bonds to refund an illegal debt; recitals in bonds of issuance "in accordance with" law and of compliance with all conditions; action by bona fide holder; county estopped.

493. (Kan. 1898.) Refunding bonds issued by the board of commissioners of Haskell county, Kansas, contained a recital that they were "issued in accordance with the provisions of an act of the legislature of the State of Kansas, approved March 8, A. D. 1879, entitled 'An act to enable counties, municipal corporations, the board of education of any city, and school districts to refund their indebtedness,'" and that "all and singular the provisions of the above law have been fully complied with in issuing this bond, and all preliminary steps therein required have been taken, and all conditions precedent and subsequent there provided for have been fully met and complied with."

In an action upon interest coupons cut from such bonds, the county urged as a defense that the bonds were illegal and void for the reason that the pretended indebtedness refunded was illegal and void. The plaintiff being a bona fide purchaser of the bonds, the court held that he was entitled to recover.

"The case presents the old question we have answered in the negative so many times: May a municipal corporation make a false certificate on the face of its negotiable bonds, or a false record that they were issued in accordance with the law for a lawful purpose, and then defeat a recovery upon them by an innocent purchaser, who has bought in reliance upon the certificate or record, by proof that they were in fact issued for an unlawful purpose?" *Board of Comrs. of Haskell County, Kan., v. National Life Ins. Co. of Montpelier, Vt.*, 32 C. C. A. 591, 90 Fed. 228.

Recital of issuance in accordance with law.

494. (Kan. 1898.) "The only unique feature in this case is that the plain-

tiff in error avers in its answer that refunding bonds to the amount of \$23,000 were issued in exchange for void and illegal county warrants, which amount, with interest, to \$22,200, and in payment of \$800 for the services of the holder of the warrants in refunding them, and it claims that all these bonds are void because they were issued in violation of section 1 of chapter 50, that the refunding bonds 'shall not exceed in amount the actual amount of outstanding indebtedness.' This defense, however, is not available to the county, because the bonds contain a certificate that they were issued in accordance with the provisions of the act of 1879, and they have been purchased by the defendant in error in open market in reliance upon this certificate. It is too late for the county to defeat their collection by proof that its certificate is false, and that the bonds were issued in violation of, instead of in accordance with, this statute. The judgment below is affirmed upon the authority of the opinion in *Board of County Comrs. of Seward County v. Aetna Life Ins. Co.*, supra, and the cases there cited." *Board of Comrs. of Meade County, Kan., v. Aetna Life Ins. Co.*, 32 C. C. A. 600, 90 Fed. 237.

Recitals of issuance "by authority of" law.

495. (Nebr. 1899.) Railroad-aid bonds were issued by Grattan township, which passed into the hands of innocent purchasers. They contained recitals that they were "issued by authority of the laws of the State of Nebraska," particularly referred to. In an action on the bonds it was urged as a defense that certain conditions had not been performed by the railroad company. The court say on this point:

"But the board certified that these bonds were issued under and by authority of the statutes. If, under any circumstances, the board would have had authority to issue them, and the bonds would have been valid, innocent purchasers had the right to presume that those circumstances existed when they were issued, and the township was estopped to deny their existence after such purchasers had bought them in reliance upon the certificate that they were issued in compliance

with the statute. There were circumstances under which the bonds might have been valid. The railroad might have been constructed through the township. The township is, therefore, estopped by the certificate in the bonds from avoiding or repudiating them on the ground that it was not constructed through the township. The State of Nebraska imposed the duty and vested the power of determining whether or not two-thirds of the voting electors of the township of Grattan had voted in favor of issuing these bonds, of determining whether or not the railroad had been constructed and put in operation to the city of O'Neill on or prior to August 1, 1890, and of determining whether or not it had been constructed through the township of Grattan, if that was a condition precedent to their issue, in the board of supervisors of the county of Holt. That board decided that all the requisite conditions precedent to their issue had been fulfilled. It sent the bonds forth, and certified on the face of each one of them that they had been issued under and by authority of the statutes of the State. The recitals of officers who are invested with authority to determine when conditions precedent to the issue of negotiable bonds are complied with, and with power to issue them upon the fulfillment of such conditions that they have been sent forth, 'In pursuance of,' or 'in conformity with,' or 'by virtue of' the statute which authorizes their issue, under the prescribed conditions, preclude inquiry, as against innocent purchasers for value, as to whether or not the precedent conditions had been performed when the bonds were issued." *Grattan Township v. Chilton*, 38 C. C. A. 84, 97 Fed. 145.

Recitals of compliance with constitutional debt limit.

490. (Colo. 1899.) Bonds of Lake county, Colorado, in the sum of five thousand dollars, contained a recital that they were issued "Under and by virtue of and in compliance with" the act of March 24, 1877, and, "that the provisions of said act have been fully complied with by the proper officers in the issuing of these bonds." Held, that the county was estopped by these recitals from proving as a defense to them that they were in excess of the constitutional

debt limitation; that such recital, "Was necessarily a certificate that they had been issued in compliance with, and not in violation of, the constitutional as well as the statutory limitation. *Dudley v. Board*, 49 U. S. App. 336, 344, 345, 26 C. C. A. 82, 86, 87, and 80 Fed. 672, 676, 677. A certificate or recital, by the officers authorized to determine the question and to make the recital, that a constitutional limitation has not been exceeded, or that a constitutional condition has been fulfilled, raises an estoppel in favor of a bona fide purchaser as conclusive as a recital or certificate of like effect relative to a statutory limitation or requirement. This rule was announced by this court, in 1894, in *National Life Ins. Co. of Montpelier v. Board of Education of City of Huron*, 27 U. S. App. 244, 265, 10 C. C. A. 637, 651, and 62 Fed. 778, 791; and it was affirmed by the Supreme Court, upon a review of the authorities, in 1898, in *Board of Comrs. of Gunnison County v. E. H. Rollins & Sons*, 173 U. S. 255, 273, 274, 19 Sup. Ct. Rep. 390. To the same effect are *Buchanan v. City of Litchfield*, 102 U. S. 278, 290; *Pana v. Bowler*, 107 id. 529, 539, 2 Sup. Ct. Rep. 704; *Oregon v. Jennings*, 119 U. S. 74, 92, 7 Sup. Ct. Rep. 124; *Chaffee County v. Potter*, 142 U. S. 355, 364, 12 Sup. Ct. Rep. 216."

"The following authorities expressly hold that such recitals as those contained in these bonds — recitals which import an issue in accordance with the terms of the law or Constitution which contains the limitation — estop the municipality from defeating the bonds on the ground that its debt exceeded the prescribed limitation. *Dudley v. Board*, 49 U. S. App. 336, 346, 26 C. C. A. 82, 87, and 80 Fed. 672, 677; *Marcy v. Oswego Township*, 92 U. S. 637, 641; *Humbolt Township v. Long*, id. 642, 645; *Sherman County v. Simons*, 109 id. 735, 737, 3 Sup. Ct. Rep. 502; *Dalles County v. McKenzie*, 110 U. S. 686, 687, 4 Sup. Ct. Rep. 184; *Wilson v. Salamanca Township*, 99 U. S. 499, 504; *Chaffee County v. Potter*, 142 id. 355, 364, 12 Sup. Ct. Rep. 216; *Board of Comrs. of Gunnison County v. E. H. Rollins & Sons*, 173 U. S. 255, 273, 274, 19 Sup. Ct. Rep. 390." *Board of Comrs. of Lake County, Colo., v. Sutliff*, 38 C. C. A. 167, 97 Fed. 270.

Recitals of issuance in satisfaction of a judgment; estoppel.

497. (Colo. 1899.) "The seventh defense was that there never were any judgments in payment or satisfaction of which the bonds were issued. This is a good defense against the bonds in the hands of the original creditor who accepted them in exchange for the indebtedness of the county to him, upon which he had obtained no judgments. The plaintiff replied to this defense, however, that he had acquired the bonds and coupons for value, before maturity, without notice of any defect in them, and that he paid the consideration for his purchase in reliance upon the recital which was contained in each bond, that it was issued by virtue of the act of 1889, 'in satisfaction at par of judgments and accrued interest thereon which have been rendered in the courts of record in this State against Ouray county aforesaid.' The act of 1889 empowered the board of county commissioners to issue these bonds in satisfaction of judgments against the county. The board could not do this until it had first ascertained and decided what judgments there were against the county. Thus the law, by its very terms, necessarily vested the power in, and imposed the duty upon, this board to determine whether or not the judgments existed, in satisfaction of which it issued the bonds. The entry of the judgments was a condition precedent to the exercise of the power to issue the bonds,—a condition whose existence it was the duty of the board to ascertain before it issued them. It discharged this duty. It searched and found that the judgments existed. It issued the bonds in payment of the judgments, and it certified on the face of each bond that it was issued in satisfaction of judgments against the county 'by virtue of' the act of 1889. A bona fide purchaser has bought and paid for these obligations in reliance upon this certificate. It is now too late for this county to prove its falsity, to defeat the bonds." *Geer v. Board of Comrs. of Ouray County, Colo.; Comrs. of Ouray County v. Geer*, 38 C. C. A. 250, 97 Fed. 435.

Refunding bonds; recitals of compliance with law; invalidity of part of refunded debt; estoppel to show.

498 (Ill. 1900.) Refunding bonds were issued by the town of Mt. Ver-

non, Illinois, in pursuance of a law of the State authorizing the issuance of such bonds. They recited that they were issued for the purpose of funding and retiring certain binding, subsisting, legal obligations of the town which remain outstanding and unpaid, and that all the requirements of the refunding act had been fully complied with in the issue. The money received for the bonds was used by the town for the purpose of taking up and refunding certain outstanding instruments on which the town had been paying for many years a higher rate of interest. It was claimed that the refunding bonds were invalid for the reason that a portion of the refunded bonds were not valid. Held, that the town was estopped by the recitals in the bonds from denying the validity of the refunded debt.

"These recitals were recitals of facts, and presumably, and no doubt in fact, were within the knowledge of the town authorities. In order to render the bonds salable at a low rate of interest, they were made payable to bearer, and negotiable, and those recitals put into them. The town authorities knew very well that in no other way could they be sold on the market. Having put these recitals in the bonds, whereby they were enabled to sell them, and having sold them, and used the proceeds to pay off the previous indebtedness of the town on which they had been paying 8 per cent. interest for many years, the injustice of this defense to the new bonds, purchased in the open market by a bona fide holder, in repudiating and falsifying its own representations of fact contained in the recitals, is quite apparent, and can receive but little countenance in a court of justice." *Wesson v. Town of Mt. Vernon*, 39 C. C. A. 301, 98 Fed. 804.

Estoppel by recitals in bonds; payment of interest; retention of proceeds; irregularities in election; absence of resolutions by township boards.

499. (Mich. 1890.) "Objection is made, however, that the meetings were not properly called, in several particulars. We do not think it necessary to consider the defects urged by counsel in respect either of the meeting of June 28, 1871, or that of August 23, 1871, for the reason that we think the township is estopped as against

a bona fide purchaser, by the recitals in the bonds, by its payments of interest coupons, and by its retention of the money paid in good faith for the bonds, to set up any defects in the steps preliminary to the issue of the bonds. The bonds recite that they were issued in conformity with the special act of the legislature already referred to, and were authorized by the legal vote of the qualified voters of the township at a special meeting held upon a certain date. The special act requires that the bonds should be issued by the township board. The recital is in effect, therefore, that the bonds are issued by the board. There is direct evidence that the township board authorized the supervisor and treasurer, by resolution, to execute the bonds issued in accordance with the vote, and at the township meeting held August 23, 1871. This fact is further shown by the action of the board in paying the interest on the bonds for two years after their issue. There is no direct evidence of the passage of a resolution by the township board directing the execution of the bonds authorized by the meeting of June 28, 1871, but the action of the board in paying coupons upon these bonds certainly tends to show that they were executed by authority of the board. The law did not specify the manner in which the bonds should be executed, but left that to the board, who were directed to issue them. The board might act in issuing the bonds either by all of its members, or it might act in executing the bonds by one of its members, or by some township officer whose duties made it natural and proper for him to act in such a capacity. The supervisor who signed these bonds was the executive officer of the township. He was ex-officio a member of the board, was the agent of the township upon whom all service of process must be made, and, while not the president of the township board, was distinctively the general representative of the township in its dealings with others. The township treasurer was the financial officer of the township, whose duty it was to receive the proceeds of the bonds and to disburse them. If the fact was that the board directed the executive officers to sign the bonds on its behalf, and they did so, the binding effect of the bonds and their recitals on the

township board is none the less because the agency of the supervisor and treasurer for the board is not as fully set forth as might be on the face of the bonds. In accepting the bond as the bond of the township board, whether signed by the officials under a fully-recited authority, or under one less elaborately set forth, the purchaser ran the risk of the actual existence of such authority. If the board had not directed their execution, the bonds were void, however fully the signing officers witnessed the fact. If it had directed the execution of them, then, so far as the board was concerned, it had given validity to them. Hence, it follows that, if the fact be that the board directed the execution of the bonds as they were executed, the recitals on the face of the bonds are to be given as full effect as if made in terms by the board itself. The board under the special act was given authority to issue the bonds. It was its duty to order the special township meeting in accordance with the written application of the ten legal voters who were freeholders within such township. It was therefore within its implied authority to pass upon the validity of such application. Before issuing the bonds, it must decide that the proper vote had been taken at the township meeting, upon a notice properly issued. As it was the tribunal to decide these questions, it necessarily had authority to recite its decision in the face of the bonds. These conclusions bring this cause within the numerous cases in which municipal corporations having statutory power to issue bonds have been held estopped to deny the validity of bonds issued by them, by the recitals of the issuing officer or body in the face of the bonds that all the steps preliminary to the lawful issue of the bonds have been complied with. The scope of the recitals here is quite as wide as in a number of cases decided by the Supreme Court and by this court. *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Ashley v. Board*, 16 U. S. App. 656, 8 C. C. A. 455, 60 Fed. 55; *Risley v. Village of Howell*, 12 C. C. A. 219-222, 64 Fed. 453; *City of Cadillac v. Woonsocket Inst. for Savings*, 16 U. S. App. 545, 7 C. C. A. 574, 58 Fed. 935." *Rondot v. Rogers Township*, 39 C. C. A. 462, 99 Fed. 202.

Bonds issued to aid glass factory; refunding bonds; recitals of legality of debt refunded; of compliance with law; estoppel to show illegal purpose; legal publication of ordinance imported by recitals in bonds.

500. (Ohio, 1900.) "Whether it is competent for a municipal corporation, having the power to issue bonds for the refunding of its indebtedness, and having exercised that power by passing an ordinance directed to that purpose, and issued in due form its negotiable bonds, reciting that they are issued in conformity with the statute, and that all the requirements of the law have been duly complied with, and that all the conditions precedent exist, to deny its obligation as against a bona fide holder thereof for value, who has taken them before maturity."

"We think this question must be answered in the negative."

"It must be admitted that the scheme of issuing the bonds of the village for the purpose of promoting the glass factory was unlawful, and the device of exercising an unquestioned power of the council of the village to give its obligations the appearance of validity was in point of law a great abuse of authority. But it is evident enough that the electors of the village, as well as the members of the council, were involved in the conspiracy to gain an unlawful end, by professing an honest and lawful purpose, and using the means permitted for such purpose. It would be an utter perversion of justice if, by such an exploit, the result finally worked out should be that the public, who have confided in the good faith and the integrity of the representations of those who sent the bonds into the market, should be made to pay the intended bonus to the glass factory, while the promoters of the scheme reap the benefits which were expected to result therefrom."

A recital in municipal bonds issued in pursuance of legal authority, that "All acts, conditions and things required to be done precedent to and in the issuing of said bonds have been properly done, happened and performed in regular and due form as required by law," is equivalent to a representation that the ordinance authorizing the issuance of the bonds had been published according to the

requirements of the law. *Village of Kent v. Dana*, 40 C. C. A. 281, 100 Fed. 56.

Refunding bonds; recital of authority for issue; estoppel to show fraudulent inception of debt.

501. (Kan. 1900.) Refunding bonds, issued by the board of commissioners of Barber county, Kansas, recited that they were issued in accordance with the provisions of the general law found in chapter 50, Laws of 1879. In a suit on such bonds by a bona fide holder thereof, it was held to be no defense that the debt refunded by such bonds consisted of county warrants which were fraudulent in their origin and issue. *Board of Comrs. of Barber County, Kan., v. Society for Savings*, 41 C. C. A. 667, 101 Fed. 767.

Railroad-aid bonds; recital of compliance with law and conditions; estoppel to show noncompliance with conditions of vote.

502. (Kan. 1900.) Bonds were issued by the board of commissioners of Cowley county, Kansas, containing a recital: "This bond is one of a series of one hundred and thirty-six bonds of like tenor, effect and amount, executed and issued by the county commissioners of said Cowley county by virtue and in pursuance of an act of the legislature of the State of Kansas, entitled 'An act to enable counties, townships and cities to aid in the construction of railroads, and to repeal section eight of chapter thirty-nine of the Laws of 1874,' approved February 25, 1876, and the acts of the legislature of said State amendatory thereof and supplemental thereto, and in pursuance of and in accordance with the vote of a majority of the qualified electors of said Cowley county at a special election regularly called and held therein on the 29th day of April, 1879."

In an action on interest coupons from said bonds by a bona fide holder thereof, the county was held to be estopped by these recitals from defeating a recovery on the ground that the proposition which received the vote of a majority of the electors of the county did not correspond in terms with the conditions of the bonds. *Board of Comrs. of Cowley County, Kan., v. Heed*, 41 C. C. A. 668, 101 Fed. 768.

Funding bonds; valid authority; recitals of full compliance with conditions; estoppel to show non-existence of debt; that no legal election was held; that bonds were not advertised for sale; were never registered; that no provision was made for levy of tax; that debt funded was fraudulent; rules stated.

503. (S. Dak. 1900.) A statute of the territory of Dakota authorized counties which had issued warrants or other evidences of indebtedness since January 1, 1887, for the purpose of building a courthouse or jail, or both, to issue bonds to fund such warrants or other indebtedness. Funding bonds were issued by Hughes county, containing certain recitals required by the statute, and a further certificate importing that they were issued in accordance with an election duly held under said act, and that all acts, conditions, and things required to be done precedent to and in the issuing of the bonds had been properly done, happened, and performed in regular and due form as required by law.

In an action by a bona fide holder upon coupons cut from such bonds it was urged by the county that, as the county had incurred no such debt between January 1, 1887, and February 21, 1889, when the act was passed, the county was without power to fund any debt under the act, and that the recital in the bonds could not estop the county from denying this want of power, and could not create the power. Held, that there was legal power and that the county was bound by its representations contained in the bonds.

"Their argument ignores the vital distinction between that total want of power which no act or recital of the municipality can remedy, and the total failure to exercise or the inadequate exercise of a lawful authority. It ignores the essential difference between a total lack of power under the laws under all circumstances, and a lack of power which results merely from the absence of some precedent facts or acts which condition either the existence or the exercise of the power. The former, it is true, cannot be affected by the estoppel of recitals, but the latter may be. A municipality or a quasi-municipality may not, by

the recitals in its bonds, estop itself from denying that it is without power to issue them when the laws are such that there can be no state of facts or of conditions under which it would have authority to emit them. But if the laws are such that there might, under any state of facts or circumstances, be lawful power in the municipality or quasi-municipality to issue its bonds, it may by recitals therein estop itself from denying that those facts or circumstances existed, and that it had lawful power to send them forth, unless the Constitution or act under which the bonds are issued prescribes some public record as the test of the existence of some of those facts or circumstances."

In an action by a bona fide holder upon coupons cut from such bonds, the county urged as a defense that no fundable debt of the county existed, and that, as the county board was limited in its authority as agent of the county, it could not, by its recitals or certificate that a fundable debt existed, extend or enlarge its authority, and thereby estop the county. Held, that the county was thereby estopped.

"But this argument ignores the great principle upon which the effect of recitals in municipal bonds is based. That principle is that one may not vest in his agent the power to determine whether or not he has authority in a given case, and silently take the benefit of his decision and his act as agent, and then deny his authority, to the detriment of strangers who have innocently acted in the belief that his power was ample. It is that when a municipal body has lawful authority to issue bonds on the condition that certain facts exist or certain acts have been done, and the law intrusts the power to, and imposes the duty upon, its officers to ascertain, determine and certify the existence of these facts at the time of issuing the bonds, their certificate will estop the municipality, as against a bona fide holder of the bonds, from proving its falsity to defeat them." A large number of cases cited.

It was also urged that the county board was not the board whose duty it was to canvass the votes cast at the election on the proposition to issue bonds, and for that reason the board could not, by its recitals, estop the county from showing that there was

no valid election. Held, that the county was estopped.

"But it was the duty of that board, before it made the certificate which the statute required it to place in the face of these bonds, to ascertain and determine whether or not the electors of the county had voted to issue them. If the board was not itself empowered to canvass that vote, it was its duty to examine the return of the canvassing board, and learn therefrom what the state of the vote was and upon what proposition it was cast."

It was also urged that the recitals did not estop the county from showing that it had no indebtedness which could be funded under the act of 1889, because they contained no express statements of the existence of such a debt. Held, that the county was estopped.

"The existence or nonexistence of a debt which might be funded under this act was a fact which the board of county commissioners of this county was required to learn and to know in the ordinary discharge of the duties of its office. No funding bonds could have been issued in pursuance of the act of 1889, unless there was a county debt of the character described in that act to be funded. The existence of such a debt was the first fact which the board was necessarily compelled to ascertain and determine before it issued the bonds and made the certificate which they contained, and its recitals that these bonds were issued in pursuance of that act is a plain certificate that they were issued in place of a just and valid indebtedness of the county, which the act of 1889 authorized that board to fund."

Such recitals estop the county from showing that it had no fundable debt; that the proposition submitted to the vote of the electors did not conform to the statute or to the certificate in the bonds; that the bonds were not advertised for sale; that they were never registered in the office of the county clerk or county auditor, notwithstanding all these facts appear by the books and records of the board of county commissioners and of the county clerk.

"The legal effect of the recital that these bonds were issued in pursuance of the act of 1889 was that they were issued to fund a valid debt of the county of the character described in

section 11 of that act; that a lawful proposition for their issue had been submitted to and sustained by the favorable vote of the electors of the county; that the bonds had been duly advertised for sale; that they had been properly registered; and that every other fact existed, and every other act had been done, which under the act of 1889 conditioned a lawful issue of the bonds."

Such recitals estop the county from showing that no provision had been made for the collection of an annual tax sufficient to pay interest and principal of said bonds when due, as required by the Constitution of South Dakota.

"There are two answers to this proposition. The first is that the certificate that the bonds were issued in pursuance of the act of 1889 is a certificate that the provision for the collection of the annual tax required by the Constitution which the board of county commissioners that made the certificate was authorized to make had already been made. * * *

Another answer is that the certificate in the bonds is conclusive that there was a just debt to be funded, and the issue of bonds to fund this debt neither created nor increased the indebtedness of the county, but simply changed its form, so that no provision was required to be made, under the Constitution, for an annual tax to pay the refunding bonds or their interest."

"Nor is it any defense to these bonds in the hands of an innocent purchaser that the warrants which they were issued to retire were fraudulent and void, that the apparent debt which they were issued to pay was fictitious, and that their proceeds were diverted from the lawful purpose specified in the bonds to illegal and useless ends." *Hughes County, S. Dak., v. Livingston*, 43 C. C. A. 541, 104 Fed. 306.

Irregular organization of precinct; estoppel to show as against bona fide holder of bonds; estoppel to deny that a legal proposition was submitted to voters.

504. (Nebr. 1900.) Bonds issued by the board of county commissioners of a county in Nebraska, not under township organization, on behalf of a precinct in such county, for which there was legal authority, contained on their

face a recital or certificate: "The question of issuing this bond and the thirty-nine others of said series, amounting in the aggregate to forty thousand dollars, was submitted, by the county commissioners of said county of Otoe, to a vote of the legal voters of Nebraska City precinct aforesaid, in the manner provided by law, at an election duly ordered and held on the sixteenth day of November, A. D. 1886, at which said election more than two-thirds of the votes were cast in favor of the proposition to issue said bonds; and the county commissioners of said county being vested by law with authority for that purpose, having found that all the requirements of law necessary to authorize the issue and delivery of said bonds had been fully complied with, ordered that they be issued and delivered accordingly, and that they be and continue a subsisting debt against said precinct until they are paid and discharged."

Boards of county commissioners of such counties were charged with the duty of forming or organizing the precincts of the county. Held, in an action upon such bonds by a bona fide holder, that the county was estopped by the recitals in the bonds from denying that the precinct on whose behalf they were issued was legally organized.

"The creation of Nebraska City precinct in the way prescribed by the statutes of Nebraska was a condition precedent to the issue of these bonds of the county of Otoe upon the favorable vote of its electors. That county and its board of county commissioners had full power to create or modify that precinct so that it should be in accordance with the statutes of that State. They also had full power to determine whether or not that condition had been complied with, and to certify the answer to that question upon the face of the bonds. They negligently failed to comply with it, but clearly certified that they had done so. Upon the faith of that certificate, plaintiff has purchased the bonds. In morals, in equity, and at law they are now estopped to deny the truth of their certificate in order to relieve themselves from their obligations." Held, also, that the county and the people of the precinct were estopped to deny that a legal proposition had been submitted to the voters of the

precinct, inasmuch as the recitals in the bonds imported full compliance with the law. *Clapp v. Otoe County, Nebr.*, 45 C. C. A. 579, 104 Fed. 473.

Recitals as to excessive debt.

505. (S. Car. 1901.) The bonds in suit contained this recital:

"This bond is one of a series of bonds amounting to twenty-five thousand dollars issued for the purpose of funding the outstanding indebtedness of the city, in pursuance of the general incorporation laws of the State of South Dakota approved March 7, 1890, adopted by said city, and an ordinance of said city of Pierre, entitled 'An ordinance to issue bonds, for the purpose of funding and paying the outstanding indebtedness of the city of Pierre,' approved April the twenty-fourth, 1890, and a vote of the electors in favor of issuing said bonds by a majority of the legal votes cast at a special election duly held in said city on the third day of June, 1890." The plaintiff was a bona fide purchaser. Held, that the city was estopped from asserting that the indebtedness represented by the bonds was in excess of the constitutional limitation.

"The recitals of officers of a municipality who are invested with authority to perform a precedent condition to the issue of negotiable bonds, or with authority to determine when that condition has been performed, that the bonds have been issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of,' the statute, preclude inquiry, as against an innocent purchaser for value, as to whether or not the precedent conditions had been performed when the bonds were delivered. Such recitals estop the municipal body from denying the performance of every act and the discharge of every duty which under the law its officers were required to do or discharge before and at the time when they delivered the bonds."

"A municipal corporation is estopped from defeating an action by an innocent purchaser to collect its negotiable bonds, which recite that they were issued for the purpose of funding the bonds, warrants, or floating debt of the corporation, either on the ground that the warrants or bonds which they were issued to satisfy were

void, or that the apparent debt which they were issued to pay was fictitious."

Presumption of validity.

"If upon any theory the bonds of a municipality can be valid, an innocent purchaser has the right to presume that they are so, and that the recitals in them are true." *City of Pierre v. Dunscomb, et al.*, 106 Fed. 611.

Recitals in refunding bonds estop township from denying validity of debt refunded.

506. (Ohio, 1901.) "The act under which the bonds were issued being valid, for the purposes of this suit by the plaintiff, the question next arises whether, in the face of the recitals of the bonds, the defendant is entitled to show that there was no valid existing indebtedness at the time the bonds were issued, and that the real purpose of issuing the bonds was to obtain money with which to comply with another act of the legislature authorizing the township to issue bonds for railroad purposes—a purpose plainly in violation of the Constitution of Ohio. The act contains no express provision as to who shall determine what was the amount of the present existing, outstanding indebtedness. The bonds, however, were to be issued by the trustees of the township. They were the officers of the township properly charged with the duty of incurring the indebtedness of the township, and therefore with the duty of determining, primarily at least, what was its valid indebtedness, in fixing the tax rate for its payment. There is no provision in the act referring to a public record of the indebtedness, and no requirement that such a record should be kept in the act itself. The second section does contain a provision that the bonds shall contain a recital that they are issued under and by authority of this act. It seems to me clear that this provision intends to confer upon the trustees of the township, in issuing the bonds, power to make a recital which shall show that the bonds have been duly issued under the act, and therefore that the limit of indebtedness prescribed by the act has not

been exceeded in their issue. In other words, the act confers, by implication, upon the township trustees, the power to cite the fact which they do recite in the bond, to wit, that the valid outstanding indebtedness of the township is such as to justify the issue of the bonds in order to refund it." *Board of Trustees v. Brattleboro Savings Bank*, 106 Fed. 986, 46 C. C. A. 66.

Estoppel results if facts recited could exist under any circumstances.

507. (Iowa, 1901.) "Now, it is well settled that, if the laws are such that there might under any state of facts or circumstances be lawful power in a municipality or quasi-municipality to issue its bonds, it may by recitals therein estop itself from denying that those facts or circumstances exist, unless the Constitution or the act under which the bonds are issued prescribes some public record as the test of the existence of some of those facts or circumstances."

When those making recitals are authorized to determine the facts.

"When a municipal body has lawful authority to issue bonds on the condition that certain facts exist or certain acts have been done, and the law intrusts the power to and imposes the duty upon its officers to ascertain, determine, and certify the existence of these facts at the time of issuing the bonds, their certificate will estop the municipality, as against a bona fide holder of the bonds, from proving its falsity to defeat them." *Independent School District v. Rew*, 111 Fed. 1, 49 C. C. A. 198.

Refunding bonds; recitals of compliance with Constitution and law; invalidity of part of refunded debt; estoppel.

508. (Cal. 1902.) "The refunding bonds in suit, as we have seen, recited that they were issued under, in pursuance of, and in conformity with the act of 1893, the Constitution of California, and the ordinances of the city of Santa Cruz, as well as in conformity with the vote of two-thirds of all of the qualified electors of the city, voting at a special election duly called, held and conducted, as provided by the above act; also, that all acts, con-

ditions and things required by law to be done precedent to and in the issuing of the bonds, had been properly done and performed, in legal and due form, as required by law. As between the city and a bona fide purchaser of such bonds, can the city be heard to say that the bonds were not of the class embraced by the words in the act of 1893, 'outstanding indebtedness, evidenced by the bonds and warrants thereof?' Is the city estopped to dispute the truth of the recitals in its refunding bonds, there being nothing in such recitals indicating or suggesting that they were not true?

"The city contends that it is not thus estopped, because the ordinances, under which the special election was held, disclosed the fact that the eighty-nine first mortgage bonds of the water company were included in the proposed refunding; that purchasers were bound to take notice of the provisions of such ordinances; and that the ordinances, being examined, would have disclosed the fact that the bonds, although assumed by the city, were executed by the water company, and not by the city. Let us see whether a purchaser of the bonds was bound to know what those ordinances contained."

After noticing a number of decisions of the Supreme Court on the effect of such recitals the opinion continues:

"Applying to the present case the principles heretofore announced by this court, is there any escape from the conclusion that the city of Santa Cruz is estopped to dispute the truth of the recitals in the bonds in suit, which stated that they were issued in pursuance of the act of 1893 as well as in conformity with the Constitution of California authorizing it to incur indebtedness or liability with the assent of two-thirds of the qualified voters at an election held for that purpose, and that all acts, conditions and things required by law to be done precedent to issuing the bonds had been properly done and performed in due and lawful form as required by law? We think not.

"The city of Santa Cruz had power, under the Constitution and laws of California, to refund its outstanding indebtedness, evidenced by bonds and

warrants. The nature and extent of such indebtedness were matters peculiarly within the knowledge of its constituted authorities. When, therefore, the refunding bonds in suit were issued with the recitals therein contained, the city thereby represented that it issued them under and in pursuance of and in conformity with the act of 1893 and the Constitution of the State. As nothing on the face of the bonds suggested that such representations were false, purchasers had the right to assume that they were true, especially in view of the broad recital that everything required by law to be done and performed before executing the bonds had been done and performed by the city. As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded. They were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false. On the contrary, purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds." *Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. Rep. 327, — L. Ed. —.

Estoppel by recitals in bonds; decisions by local officers that conditions had been performed.

500. (N. C. 1903.) "We may rest the validity of the bonds on the right of a bona fide holder from their recitals to assume that the county had the interest claimed and that the railroad had been begun before subscription to its stock was made. It makes no difference whether the existence or nonexistence of those conditions could have been ascertained by inquiry. Purchasers were not expected to be at or near the sources of information. The bonds were not offered in Stanley county only, or in the State of North Carolina only. They were expected to be offered in the financial markets of the other States of the Union; even offered in the financial markets of the world. They were payable to bearer. They were expected to have, and their

value, to an extent, depended upon their having almost the currency and sanction of money. If a buyer of bonds is chargeable with knowledge not only of want of power to issue them (a considerable risk, as the records of the courts show), but also of the nonperformance of conditions in pais, their value would be much diminished. And what good would such a holding subserve? The affairs of a county can only be administered by its officers, and to their attention and duty its interests must be entrusted. When the power to issue bonds, therefore, depends upon the existence of conditions, the local officers are charged with the duty and the responsibility of ascertaining them, and the presumption that the duty was exercised should and does accompany and guarantee the bonds in every financial market." *Stanley County v. Coler*, 190 U. S. 437, 23 Sup. Ct. Rep. 811, — L. Ed. —.

Recitals in bonds issued in excess of amount authorized by county court may estop county from contesting validity on that ground.

510. (Texas, 1909.) "The county insists that although the bonds purport to have been issued by order of the County Commissioners' Court in virtue of certain legislative enactments referred to on the face of the bonds, and which authorizes that court to issue bonds for the erection of a courthouse or jail, or both, and although each bond is attested by the seal of the Commissioners' Court and the signatures of the officers who alone could attest and sign bonds issued for courthouse and jail purposes, the court exceeded its powers in issuing the present bonds in that by its order of February 9, 1886, bonds to the extent of only \$80,000 were authorized—\$60,000 for a courthouse and \$20,000 for a jail; whereas, that amount of bonds for such purposes had in fact been issued before the bonds in suit. This contention means that the bonds in suit are to be deemed void if they were in fact in excess of the amount authorized by the order of February 9, 1886. But that view cannot be maintained consistently with a long line of decisions.

"Whether the Commissioners' Court,

which had statutory authority to issue such bonds as were necessary for courthouse and jail purposes, had previously made the requisite order therefor was a matter peculiarly within the knowledge of its officers. They knew whether they had or had not directed bonds to be issued for such purposes. They knew, or ought to have known, whether the bonds, ordered to be issued, were in excess of the amount authorized by the legislature. They had authority to determine whether the precedent conditions had been fully performed. When, therefore, the county, acting by the Commissioners' Court, did issue bonds, attested by the seal of the court and the signatures of its officers, and reciting that they were issued under the order of the court, in virtue of the statute named, and were registered—such recitals fairly importing a compliance, in all substantial respects, with the statute giving authority to issue bonds—a bona fide purchaser was entitled to accept the recitals as stating the truth, and the county cannot, as against such purchaser, allege the contrary. It will not be heard to say that the bonds were in excess of the amount authorized, or that they were not issued for the purposes contemplated by the statutes referred to. These principles have become firmly established, as will be seen by an examination of the adjudged cases, some of which are cited in the margin." *Town of Coloma v. Eaves*, 92 U. S. 484; *Buchanan v. Litchfield*, 102 U. S. 278; *School District v. Stone*, 106 U. S. 183; *Commissioners v. Bolles*, 94 U. S. 104; *Anderson County Commissioners v. Beal*, 113 U. S. 227, 238-239; *Chaffee County v. Potter*, 142 U. S. 355, 364; *Gunnison County Commissioners v. Rollins*, 173 U. S. 255, 270; *Mercer County v. Hackett*, 1 Wall. 83; *Cairo v. Zane*, 140 U. S. 122; *Town of Venice v. Murdock*, 92 U. S. 494; *Marcy v. Town of Oswego*, 92 U. S. 637; *Wilson v. Salamanca*, 99 U. S. 499; *Sherman County v. Simons*, 109 U. S. 735, 737; *Hackett v. Ottawa*, 99 U. S. 86, 95; *Ottawa v. National Bank*, 105 U. S. 342, and authorities cited in each of the above cases.

"The county, however, insists that an examination of the order of the

Commissioners' Court of February 9, 1886, referred to in the bonds, would have informed any purchaser (1) that that court on that day ordered only \$86,000 in bonds to be issued—\$60,000 for a courthouse and \$26,000 for a jail; (2) that the particular bonds now in suit, dated December 6, 1886, and numbered ninety-one to ninety-six inclusive, were not covered by that order and therefore were in excess of the amount so ordered for courthouse and jail buildings. Assuming for the moment, but only for the moment, that the purchaser was bound to ascertain what the order of February 9, 1886, contained, we observe that the statutes recited in the bonds did not name a specific amount beyond which the Commissioners' Court could not go in issuing bonds for courthouses and jail purposes. They were authorized to issue for those purposes such an amount in bonds as was necessary up to the point that no more be issued than could be liquidated in ten years by a tax of one-fourth of one per cent. for any one year. It was for the Commissioners' Court in the first instance to determine what amount of bonds on that basis was required. We observe, also, as did the Civil Court of Appeals of Texas in a case to be presently referred to (27 S. W. Rep. 702, 720), that the order of February 9, 1886, did not require that the bonds issued for courthouse and jail purposes should be numbered consecutively from one to eighty-six; that the bonds in suit bore numbers above eighty-six was immaterial in face of the recital in them; that they were issued by order of the Commissioners' Court and in virtue of the statutes conferring the power to issue bonds for courthouse and jail purposes; and that that order gave no information that the bonds here in suit were in excess of the \$86,000 in bonds directed by that order to be issued.

"A part from this view, it is pertinent to inquire whether the purchaser was bound to examine the order of February 9, 1886, and, at his peril, to know what that order contained? Was he not entitled without special or further inquiry to accept as true what the recitals in the bonds plainly imported, namely, that the bonds were issued for courthouse or jail purposes

by order of the County Commissioners' Court, in conformity with specified acts of the legislature? Was he not entitled to act on the belief that the bonds issued under date of December 6, 1886, were within the limit authorized by the legislature?

"These questions find an answer in *Evansville v. Dennett*, 161 U. S. 434, 441, 445, 446."

Mr. Justice Harlan quotes at length from the opinion in that case and others. *Presidio County, Texas, v. The Noel-Young Bond & Stock Company*, 212 U. S. 58, 29 Sup. Ct. Rep. 237, — L. Ed. —.

Municipal decision, recital of invalid law, recital of facts under valid law.

511. (N. Car. 1902.) "The recitals of the bonds in suit are as follows: (1) That the bond is issued by authority of an act of the general assembly of North Carolina ratified the twentieth day of February, A. D., 1879. This act being an invalid enactment, and not a law, so far as it undertakes to give power to issue bonds, this recital does not preclude inquiry as to whether or not there was such a law, and the existence of legislative authority. *Northern Nat. Bank v. Trustees of Porter Tp.*, 110 U. S. 608, 4 Sup. Ct. 254, 28 L. Ed. 258. But the recital of an invalid act does not preclude inquiry as to whether there was in existence any other valid legislative authority under which power to issue the bond could be upheld. *Wilkes Co. v. Coler*, 180 U. S. 506, 524, 21 Sup. Ct. 458, 45 L. Ed. 642; *Board of Commissioners v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110; *City of Evansville v. Dennett*, 161 U. S. 434, 443, 444, 16 Sup. Ct. 613, 4 L. Ed. 760; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93. (2) The second clause of the recital is to the effect that the bond is authorized by a vote of the majority of the qualified voters of Wilkes county by an election regularly held for that purpose on the sixth day of November, A. D., 1889, and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D., 1899. This is a recital of facts

which it was for the board of commissioners of Wilkes county to ascertain and decide, and which, therefore, the county is estopped from denying as against a bona fide holder. Board of Commissioners v. Beal, 118 U. S. 227, 229, 5 Sup. Ct. 433, 28 L. Ed. 906; Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689. (3) The bond further recites that, 'This series of bonds is issued to pay the subscription of \$100,000 made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes.' This recital is in the same way conclusive of the facts therein stated." Board of Comrs. of Wilkes county v. Coler, 51 C. C. A. 399, 113 Fed. 725.

If bonds can be legally issued under any circumstances, recitals are binding.

512. (Neb. 1902.) "It follows from what has been said that there was nothing in the statute to which this discussion relates, nor on the face of the bonds, to affect a purchaser with knowledge of their invalidity, even if they were invalid. The statute vested the municipality with a power, if rightfully exercised, to issue such bonds as those in suit profess to be. The bonds contain a recital, in the broadest language, that 'all the requirements of the Constitution and laws of the State of Nebraska necessary to authorize the issue and delivery of the bonds have been in all respects complied with,' and a purchaser thereof was entitled to rely upon this recital unless he was advised that it was untrue. In other words, if bonds in aid of the construction of a canal for irrigation and water power purposes could be lawfully issued, he was entitled to assume that the bonds in controversy had been so issued, and was under no obligation to institute inquiries with a view of finding out whether the municipality had not abused its powers, and whether, under the guise of aiding in the construction of a canal for irrigation and incidental water power purposes, it had not in reality loaned its credit in aid of an enterprise of a purely private character. E. H. Rollins & Sons v. Board of Comrs. of Gunnison Co., 26 C. C.

A. 91, 98, 80 Fed. 692. If a wrong of this character was in fact committed, it was the municipality, acting in obedience to the expressed will of more than two-thirds of its citizens, who committed it, and it cannot saddle the consequences of the wrong on an innocent purchaser of its securities. National Life Ins. Co. of Montpelier v. Board of Education of City of Huron, 10 C. C. A. 637, 651, 62 Fed. 778." City of Kearney v. Woodruff, 53 C. C. A. 117, 115 Fed. 90.

Recitals of legal submission and vote.

513. (Neb. 1902.) "The plaintiff below was an innocent purchaser of the bonds. They recite the submission of a proposition to issue them 'for the purpose of aiding * * * in the construction of a canal for irrigation and water power purposes,' and such a recital is conclusive in favor of the plaintiff, unless it is proven that he was acquainted with the terms of the proposition which was in fact submitted, and there is no such evidence. Even if no vote had been taken, the authorities are that the recital that a proper election had been held would have been conclusive in favor of an innocent purchaser, because it was the duty of the officials who issued the bonds to ascertain and determine if a proper election had been held. Commissioners v. Beal, 113 U. S. 227, 239, 5 Sup. Ct. 433, 28 L. Ed. 906; Town of Coloma v. Eaves, 92 U. S. 484, 491, 23 L. Ed. 579; Town of Oregon v. Jennings, 119 U. S. 74, 93, 7 Sup. Ct. 124, 30 L. Ed. 323; Town of Pana v. Bowler, 107 U. S. 529, 539, 2 Sup. Ct. 704, 27 L. Ed. 424." City of Kearney v. Woodruff, 53 C. C. A. 117, 115 Fed. 90.

Grounds on which recitals are held to be binding.

514. (Tenn. 1902.) "The decisive inquiry, therefore, is whether the ascertainment and determination of that fact was devolved upon the board of mayor and alderman, to be made upon any application for aid which should be made to it under the statute; for if the fact was entirely extrinsic to the duty of the board, and was intended to remain in all circumstances a matter of fact unaffected by any determination which the board might

make, then the recitals are of no avail so far as that question is concerned, and the matter would be left to be ultimately tested whenever the question should arise. On the other hand, if the proper construction of the act is that the legislature intended that, when the board should be required to act upon an application submitted to it, it should inquire and determine, as one of the bases upon which it would proceed, whether the applicant was such a corporation as the statute intended, then the recitals would undoubtedly conclude that fact, and, upon the admission that the plaintiff is a bona fide holder of the coupons for value, it would be entitled to recover. These propositions have been so many times affirmed in the federal courts that extensive citation of the cases will not be attempted."

Reasons for the rule fully discussed in the opinion. *Municipal Trust Co. v. Johnson City*, 53 C. C. A. 178, 116 Fed. 458.

Recitals conclusive as to all matters affecting validity except those disclosed by the bonds when read with the enabling act.

515. (Kan. 1902.) "The testimony below showed, without contradiction, that the entire issue of bonds in suit, amounting to \$5,000, was sold in the open market for cash, at a small premium above their par value, in the month of March, 1887, shortly after they were executed, and that the purchaser had no knowledge of any facts or circumstances impairing their validity, save such as was disclosed by the bonds themselves, when read in connection with the act under which they had been issued. The original purchaser of the bonds, and all subsequent holders thereof, who succeeded to his rights, must be regarded, therefore, as bona fide holders, unless the bonds themselves, or the act under which they were issued, or both, when read together, disclosed that they were issued without authority or not in conformity with law, and were for that reason invalid. *E. H. Rollins & Sons v. Board of Comrs. of Gunnison Co.*, 26 C. C. A. 91, 80 Fed. 692, 700; *Id.*, 173 U. S. 255, 274, 19 Sup. Ct. 390, 43 L. Ed. 689; *Rathbone v. Board,*

27 C. C. A. 477, 83 Fed. 125; *Commissioners v. Clark*, 94 U. S. 278, 286, 24 L. Ed. 59. If they were bona fide holders, the recital in the bonds is obviously of such a nature as will cure any irregularity in the exercise of the power to issue them which was conferred on the municipality by the act of March 5, 1887. The recital also estops the municipality from pleading that its officers acted fraudulently in issuing the bonds or in disposing of the proceeds. These defenses are eliminated by the recital, upon the assumption that the securities were sold to an innocent purchaser for value." *Board of Commissioners v. Vandriss*, 53 C. C. A. 192, 115 Fed. 866.

Resolution of township board directing issue of bonds; recitals preclude inquiry as to.

516. (Kan. 1902.) "Counsel for the county suggest, however, that it does not appear affirmatively that the township board, as a board, ever resolved to issue the bonds, or ever authorized the township trustee and the township clerk to sign them, and that no recovery ought to have been allowed, for that reason, although they were signed by the proper persons. This suggestion, we think, is without merit, in view of the fact that the bonds are in the hands of an innocent purchaser for value, who bought them on the strength of the recital that 'all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened and performed in regular and due form as required by law,' and who also bought them on the faith of the auditor's certificate, which was appended to each bond, to the effect that they had been 'regularly and legally issued.' Because of this recital and the certificate of the auditor, an intending purchaser had the right to assume that the bond had been executed in pursuance of appropriate formal action which had been lawfully taken by the township board." *Board of Commissioners v. Vandriss*, 53 C. C. A. 192, 115 Fed. 866.

Bonds exceeding constitutional limit; recitals in bonds; estoppel.

517. (Iowa, 1902.) "The primary question in the case, therefore, be-

comes: Is a bona fide purchaser of municipal bonds, which recite that they were issued in pursuance of a statute authorizing the municipality to issue them for a lawful purpose, and in conformity with an ordinance or a resolution of a specified date, which discloses the fact that they were issued for an unlawful purpose, charged with notice of the terms and contents of the ordinance or resolution? The question is not new, and the answer to it is to be found in the opinions of the Federal courts. In the earlier decisions of this court, and in at least one of those of the Circuit Court of Appeals of the Seventh Circuit, this question was answered in the affirmative. *National Bank of Commerce v. Town of Granada*, 54 Fed. 100, 4 C. C. A. 212; *Hinkley v. City of Arkansas City*, 69 Fed. 768, 773, 16 C. C. A. 395, 400; *Post v. Pulaski Co.*, 1 C. C. A. 405, 49 Fed. 628. But after the decision of the Supreme Court in *Town of Evansville v. Dennett*, 161 U. S. 434, 439, 443, 16 Sup. Ct. 613, 40 L. Ed. 760, and after a careful reconsideration of the question, in view of the opinion in that case, those earlier cases were overruled, and the proposition was announced to which this court has since adhered. It is that the recital in municipal bonds that they were issued in accordance with the provisions of the enabling statute imports that they were sent forth in pursuance of a lawful and proper resolution or ordinance, and of just and proper action by the governing board of the municipality. It relieves the innocent purchaser of all inquiry, notice, and knowledge of the actual action and record of the board or council, and estops the municipality from denying that proper action was taken and that a lawful resolution or ordinance was passed. *Board of Comrs. of Haskell Co. v. National Life Ins. Co.*, 32 C. C. A. 591, 594, 90 Fed. 228, 231; *Hackett v. City of Ottawa*, 99 U. S. 86, 95, 25 L. Ed. 363; *Town of Evansville v. Dennett*, 161 U. S. 434, 439, 16 Sup. Ct. 613, 40 L. Ed. 760; *Waite v. City of Santa Cruz*, 22 Sup. Ct. 327, 333, 46 L. Ed. 552; *Wesson v. Saline Co.*, 73 Fed. 917, 919, 20 C. C. A. 227, 229." *Fairfield v. Rural Ind. School District*, 54 C. C. A. 342, 116 Fed. 838.

Grounds of estoppel by recitals in bonds; recitals conclusive on validity of debt refunded and of constitutional limitation.

518. (Iowa, 1902.) "This case, therefore, stands in this way: These bonds were issued and exchanged for outstanding bonds of the district at the same time with thirty-seven other bonds, which, together with these, aggregated \$23,700—an amount more than six times the constitutional indebtedness of the district. But the face of the bonds did not disclose this fact. The plaintiff bought but three bonds, and their aggregate amount was only \$2,000—an amount far within the limit of the district's lawful indebtedness—so that there was nothing in the bonds or in the transaction which resulted in their purchase to charge the plaintiff with notice of the defense here urged. The members of the board of directors were the officers and financial managers of the district. The amount, character, and validity of its bonds, judgments, warrants, and debts were facts peculiarly within their knowledge. Chapter 132 empowered them to issue these bonds for the purpose of funding the bonded debt of their district. They could lawfully issue these new bonds only to pay the just and valid debts of the quasi-municipality which they represented, and their primary duty was to ascertain the validity of every bond in return for which they issued a new obligation. The law vested them with the power, and charged them with the duty to ascertain, determine, and certify, in the first instance, whether or not the district had a debt that was fundable under this chapter 132. It also gave them the power, and imposed upon them the duty, to ascertain, determine, and certify whether or not every act had been done, and every fact existed, which conditioned a lawful issue of these bonds before they sent them forth. When they certified, in the face of these negotiable instruments, that they were issued 'in pursuance of, and in conformity with, chapter 132,' and 'in strict compliance with the laws of the State of Iowa,' and the plaintiff bought them in reliance upon that certificate, these facts conclusively estopped the district from denying—First, that the

bonds for which they were exchanged were the just and valid obligations of the district; * * * and, second, that the refunding bonds neither created nor increased the indebtedness of the quasi-municipality. * * * Funding bonds neither create nor increase a debt. They merely change its form, and an innocent purchaser of municipal bonds, which recite that they were issued to fund the debt of the municipality, is not required to consider or inquire concerning the excessive indebtedness, because that question does not arise." A number of authorities cited in the opinion. *Fairfield v. Rural Ind. School District*, 54 C. C. A. 342, 116 Fed. 838.

Estoppel applies to constitutional as well as statutory requirements and limitations.

519. (Wis. 1902.) "We fail to perceive any sufficient reason why the estoppel should not operate with respect to an act required by the Constitution to be done, as well as to an act required by the statute to be done. The mischief to be prevented is the same, and there would seem to be no good reason for distinction."

Recitals estop city to deny that provision was made when bonds issued, for collection of tax to pay interest and principal, as required by Constitution of State.

"Assuming, as we do, that the Constitution required that the city should levy an annual tax at or before the time of issuing the bond, as distinguished from the assessment made, that duty was cast upon the authorities of the city; and, when it has certified that 'all acts required to be done precedent to and in the issuing of the bond have been duly performed in regular and due form as required by law,' we perceive no need for a more specific recital. We are of opinion that, as against a bona fide holder before maturity and for value, the bond in question must be held to be a valid legal liability of the municipality." *King v. City of Superior*, 54 C. C. A. 499, 117 Fed. 113.

Recitals create estoppel as to statutory limitation of indebtedness.

520. (Neb. 1902.) "It is contended,

however, that the amended act of 1870 did not authorize the issue of the second series of bonds for \$35,000, for the reason that they increase the amount of bonds emitted by this city for water works to the sum of \$125,000, which was \$25,000 above the limit fixed by that act. The answer is that recitals in the face of bonds made by officers of municipal or quasi-municipal corporations in whom the power is vested and upon whom the duty is imposed of determining whether or not conditions precedent to the issue have been fulfilled, or whether or not limitations have been exceeded, estop the corporations, as against a bona fide purchaser of the bonds or coupons, from defeating them on the ground that these recitals were false, unless notice was given to the buyer by the face of the bonds, or by some public record prescribed by the Constitution or by the act under which the bonds were issued as a test of the limitation or condition." A large number of cases cited in the opinion.

Create estoppel as to legality of submission to electors.

"The recitals in these bonds import that they were issued by authority of a majority vote of the electors of the city of Beatrice upon the proposition to issue them prescribed by law and by authority of just and honest action by the mayor, the council, and the clerk of the city. They relieve innocent purchasers of all inquiry, notice, and knowledge of the actual proposition submitted, and of the action of the mayor and council thereon, and estop the city from denying that the proposition prescribed by the statute was submitted to and sustained by the electors, and that the bonds and coupons were issued in pursuance of that action." The opinion refers to a number of decisions on this point. *City of Beatrice v. Edminson*, 54 C. C. A. 601, 117 Fed. 427.

Provisions of ordinance authorizing bonds, recitals relieving purchaser of notice of.

521. (Ohio, 1903.) "But it is urged, because the ordinance recites the special act as authority, and directs that the bonds express upon their face that they were issued by virtue of the spe-

cial act, that the recitals inserted stating they were issued 'under and pursuant to the laws of the State of Ohio,' and that all the preliminary steps required 'by said statutes,' had been taken, were unauthorized and inoperative, as an examination of the ordinance would have shown, and hence cannot be held to estop the city of Defiance. While the ordinance recited the special act, and directed that the bonds express upon their face that they were issued under it, other proper recitals were not forbidden. The declared purpose was to issue bonds to build a municipal bridge. If to do this it was necessary to comply with applicable provisions of the general law, recitals that this had been done were not unauthorized. It was the duty of the mayor to see that the ordinances and resolutions were faithfully enforced (section 1746), and the clerk to keep the records of the city (section 1755), and of both to sign and seal the bonds. To do this it was necessary for them to ascertain and determine whether all the preliminary steps had been taken, and to declare the fact. In view of this implied duty and authority, an examination of the ordinance alone would not have served to negative their statement.

"But, if an examination of the ordinance would have shown what is claimed, we do not think, in view of the recitals, that the purchaser was required to make it. He had a right to rely on the truth of the recitals. They were intended to lull him into security and avert investigation. They served their purpose. If the approval of the voters was necessary to the validity of the issue, the purchaser was assured it had been secured. The purpose for which the bonds were issued was lawful, and there was nothing on their face to excite suspicion or induce inquiry. On the contrary, the recitals close with the explicit declaration that every prerequisite had been performed; and these representations were made, over the corporate seal, by the officers and agents of the city, acting under oath and in the discharge of a statutory duty." *City of Defiance v. Schmidt*, 59 C. C. A. 150, 123 Fed. 1.

Conclusiveness of recitals in bonds.

522. (N. Car. 1904.) Bonds recited compliance with the Constitution and statutes of the State in their issuance.

"These recitals are conclusive, constituting an estoppel in pais upon the county which issued them. *Moran v. Miami Co.*, 2 Black, 722, 17 L. Ed. 342. 'Where bonds of a county on their face import a compliance with the law under which they were issued, the purchasers are not bound to look further for evidence of a compliance with the conditions annexed to the grant of power to issue them, and the county is estopped to deny, as against bona fide purchasers, that such conditions have been complied with.'" *Board of Comrs. of Henderson Co. v. Travelers Ins. Co.*, 63 C. C. A. 467, 128 Fed. 817.

Recitals in bonds—when create estoppel and when not—the distinction stated.

523. (Neb. 1905.) "The rule of law upon which the first class of decisions rests is that recitals in municipal bonds by the representative body that issues them, to the effect that all the requirements of the laws with reference to the issue have been complied with, will not estop the municipality from proving as against a bona fide purchaser that the representative body had no power to issue them, where no act of the representative or constituent body could make the issue lawful at the time it was made, and this fact appears from the Constitution and statute upon which the bonds are issued, the public records referred to therein, and the bonds the purchaser buys. *Dixon Co. v. Field*, 111 U. S. 83, 94, 4 Sup. Ct. 315, 28 L. Ed. 360; *National Life Ins. Co. v. Board of Education*, 62 Fed. 791, 10 C. C. A. 650. But the case at bar and others of a like character are controlled by a different rule, and that is that the recitals in municipal bonds, by the officers or the representative body invested with power to perform a precedent condition to their issue and with authority to determine when that condition has been performed, that they have found that all the requirements

of law necessary to authorize the issue of the bonds have been fully complied with, precludes inquiry, as against an innocent purchaser for value, whether or not the precedent condition challenged had been performed before the bonds were issued. *Clapp v. Otoe County*, 45 C. C. A. 579, 587, 104 Fed. 473, 481; *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 49 L. R. A. 534; *National Life Ins. Co. v. Board of Education*, 62 Fed. 778, 792, 793, 10 C. C. A. 639, 651, 652; *School District v. Stone*, 106 U. S. 183, 187, 1 Sup. Ct. 84, 27 L. Ed. 90; *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Commissioners v. Beall*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; *City of Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673.

"The later decisions of the courts lead to the conclusion that where, under any state of facts or circumstances which might have existed, or which the board or officers who issued the bonds and made the recital might have lawfully caused to exist, the bonds could have been legally issued, a recital therein that they have been so issued estops the municipality or quasi-municipality, as against an innocent purchaser of the bonds for value, from asserting its falsity to defeat them. *Evansville v. Dennett*, 161 U. S. 434, 443, 446, 16 Sup. Ct. 613, 40 L. Ed. 760; *E. H. Rollins & Sons v. Board of Commissioners*, 26 C. C. A. 91, 98, 80 Fed. 692, 699; *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 49 L. R. A. 534. It is also a general rule, established by repeated decisions, that a municipality, a quasi-municipality, or a corporation and its officers, who by the apparent legality of their obligations or by recitals of their validity have induced innocent purchasers to invest in them, are estopped from denying their legality on the ground that in some of the preliminary proceedings which led to their execution, or in their execution itself, they failed to comply with some law or rule of action relative to the mere time or manner of their procedure, with which they might have lawfully complied, but which they carelessly disregarded. *Speer v. Board of Commissioners*, 88 Fed. 749, 758, 32 C. C.

A. 101, 111; *Clapp v. Otoe Co.*, 45 C. C. A. 579, 587, 104 Fed. 473, 481; *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 2 C. C. A. 174, 239, 241, 51 Fed. 309, 326, 328; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 27 C. C. A. 73, 86, 82 Fed. 124, 137; *Board of Commissioners v. Sherwood*, 11 C. C. A. 507, 510, 64 Fed. 103, 108; *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272, 49 L. R. A. 534."

"The board failed to regularly issue the bonds in this case, not because it was without lawful power to do so, but because it erred in the time and manner of taking its proceedings." *Platt v. Hitchcock County, Neb.*, 71 C. C. A. 649, 139 Fed. 929.

Estoppel by recitals in bonds; as to constitutional as well as statutory provisions.

524. (Ill. 1907.) In an action at law against a county on its funding bonds:

"Under the issues tendered and raised by pleadings and testimony, the judgment can be upheld only upon the ground that the county is estopped, as against the bona fide purchaser of the bonds for value, from setting up the invalidity, in whole or in part, of the alleged indebtedness for which the funding bonds were voted and issued. So, the Saline county case does not expressly meet the question thus arising of the force of recitals in such funding bonds; but it is clearly applicable for interpretation of the funding statute and proceedings thereunder, and is instructive in reference to the recitals.

"The matters relied upon to defeat recovery, stated in various forms in several pleas, may be summarized in these propositions: (1) That the entire issue of original bonds, amounting to \$200,000 constituting the sole basis and consideration for the funding bonds in suit, was unauthorized and void, as theretofore 'finally and conclusively adjudged;' (2) that all of such bonds were included in the funding arrangement, so that alleged prior adjudications upholding the validity of a portion (\$105,000) of the original issue, in the hands of one Jackson, a purchaser thereof, were without force,

in any view, to authorize or validate the funding bonds thus issued; and (3) that both original and funding issues were in excess of the limit of municipal indebtedness fixed by the constitutional provision (1870) of Illinois. Each of the defenses thus plead and tendered, was (in effect) excluded by the trial court in directing a verdict for the plaintiff below, and, if the county is entitled to interpose either of these matters as a defense, error is well assigned.

"The contentions for estoppel, in support of the judgment, are twofold: First, under the recitals in the bonds and the vote authorizing the funding settlement; and, second, through final judgments against the county for the entire indebtedness thus recognized and settled."

In a lengthy and instructive discussion by the learned justice who delivered the opinion appears the following:

"The rule is well recognized that municipal bonds must contain recitals showing authority for their issuance to make them marketable as no indebtedness can be contracted by the municipality, unless (1) the legislature has granted power to that end, and (2) all contingencies are met, as provided by Constitution or statute for its exercise. Recitals are of no avail to cure the want of fundamental power to issue bonds, but they are needful and commonly made to save the purchaser from examination and proof in respect of the contingencies of fact upon which a grant of power was exercised; and upon this distinction in their legitimate office and bearing must their force be determined. When power appears, however, to issue bonds for the purpose stated, and defense is sought, through violation of Constitution or statute in its exercise—in exceeding the limit of indebtedness or like restrictions of the grant—such departure from the power has given rise to difficulty in ascertaining the true line of distinction and just effect of recitals in bonds so issued; and it may be conceded that the authorities have not been harmonious in stating the rule applicable in such cases, particularly when a constitutional provision is violated. Thus, in the opinion cited for plain-

tiff in error, in *Hedges v. Dixon County*, 150 U. S. 182, 187, 14 Sup. Ct. 71, 37 L. Ed. 1044, it is remarked, in substance, on reference to the prior Lake county cases (130 U. S. 602, 9 Sup. Ct. 651, 32 L. Ed. 1060; 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065; and 147 U. S. 230, 13 Sup. Ct. 318, 37 L. Ed. 145), that recitals in bonds may estop against a denial of legislative authority, but no such estoppel can arise when a constitutional provision is violated. Nevertheless, later decisions of the Supreme Court have, as we believe, set aside the exception from the elementary doctrine of estoppel above indicated, and upheld and established the rule as equally applicable to recitals of fact, within the knowledge of the municipality, and necessarily committed to its proper officers to ascertain and certify, as to a constitutional limit of indebtedness or like restrictive provisions upon the exercise of the power. *Gunnison County Commissioners v. Rollins*, 173 U. S. 255, 263, 19 Sup. Ct. 390, 43 L. Ed. 689; and authorities there reviewed; *Waite v. Santa Cruz*, 184 U. S. 302, 320, 22 Sup. Ct. 327, 46 L. Ed. 552; and, in this court, *Wesson v. Saline Co.*, 79 Fed. 917, 920, 20 C. C. A. 229, and *Wesson v. Town of Mt. Vernon*, 98 Fed. 804, 807, 30 C. C. A. 301; *King v. City of Superior*, 117 Fed. 113, 115, 54 C. C. A. 499. So the fact alone that defense is sought for violation of a constitutional provision, instead of a legislative requirement, in the issue of bonds is insufficient, under these controlling authorities, to avoid such estoppel from recitals of fact thereupon in the bonds."

"We are satisfied that the recitals were within the authority conferred upon the county officers, who executed and issued the bonds, and are sufficient to support the direction of verdict and judgment for recovery. The judgment, accordingly, is affirmed." *Hamilton County v. Montpelier Savings Bank & Trust Co.*, 84 C. C. A. 523, 157 Fed. 19.

Recitals in bonds; when conclusive.

525. (Colo. 1913.) "The recitals in municipal bonds by the officers or the representative body invested with power to perform a precedent condition and with authority to determine when

that condition has been performed, that all the requirements of law necessary to authorize the issue of the bonds have been complied with, precludes inquiry, as against an innocent purchaser for value, whether or not the precedent condition had been performed before the bonds were issued. *Platt v. Hitchcock County*, 130 Fed. 920, 933, 71 C. C. A. 640; *Clapp v. Otoe County*, 45 C. C. A. 579, 587, 104 Fed. 473, 481; *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 49 L. R. A. 534; *National Life Ins. Co. v. Board of Education*, 62 Fed. 778, 792, 793, 10 C. C. A. 639, 651, 652; *School District v. Stone*, 106 U. S. 183 187, 1 Sup. Ct. 84, 27 L. Ed. 90; *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Commissioners v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 900; *City of Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673.

"Where, by legislative enactment, authority has been given to the officers of a municipality to issue its bonds on some precedent condition, and where the fact may be gathered from the enactment that those officers were invested with power to decide whether or not that condition had been complied with, their recital in the bonds issued by them that it was fulfilled is duly authorized, and it estops the municipality or quasi-municipality from proving its falsity to defeat the bonds in the hands of an innocent purchaser. *Quinlan v. Green County*, 205 U. S. 410, 419, 27 Sup. Ct. 505, 51 L. Ed. 860; *Presidio County v. Noel-Young Bond Co.*, 212 U. S. 58, 65, 29 Sup. Ct. 237, 53 L. Ed. 402; *Stanly County v. Coler*, 190 U. S. 437, 451, 23 Sup. Ct. 811, 47 L. Ed. 1126; *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 23, 22 Sup. Ct. 531, 46 L. Ed. 773. A municipality, a quasi-municipality, or a corporation and its officers, who by the apparent legality of their obligations or by recitals of their validity have induced innocent purchasers to invest in them are estopped from denying their legality on the ground that in some of the preliminary proceedings which led to their execution, or in their execution itself, they failed to comply with some law or rule of action relative to the mere time or manner of their pro-

cedure, with which they might have lawfully complied, but which they carelessly disregarded. *Speer v. Board of Commissioners*, 88 Fed. 749, 758, 32 C. C. A. 101, 111; *Clapp v. Otoe County*, 45 C. C. A. 579, 587, 104 Fed. 473, 481; *Union Pacific Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 2 C. C. A. 174, 239, 241, 51 Fed. 309, 326, 328; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 27 C. C. A. 73, 86, 82 Fed. 124, 137; *Board of Commissioners v. Sherwood*, 11 C. C. A. 507, 510, 64 Fed. 103, 108; *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272, 49 L. R. A. 534." *Town of Aurora v. Gates*, 125 C. C. A. 329, 208 Fed. 101.

Recitals in bonds; bona fide purchaser protected by.

520. (Neb. 1907.) In an action at law on coupons clipped from bonds of a school district in Nebraska, it was urged that the trial court erred in its rulings excluding evidence and in overruling the school district's contention that the finding of the court was not sustained by the evidence. After discussing the several objections urged to the validity of the bonds and insufficiency of the evidence, the opinion proceeds:

"Assuming, but without deciding, that the circumstances in which the bonds were issued were such that there could be no recovery thereupon or upon any of the coupons, save by an innocent purchaser, or by one who acquired them through such a purchaser, unnecessary discussion will be avoided by at once coming to the question whether or not there was evidence to sustain a finding that Edward D. Shepard was an innocent purchaser. The bonds contained a recital that they were issued 'for the purpose of building a schoolhouse in said district, in pursuance of' the act of February 26, 1879, and the amendments thereto, and also bore a certificate by the auditor of public accounts that they were duly registered, and another by that officer and the secretary of state showing that they were issued pursuant to law, as was required by said act. Shepard was a witness for the plaintiffs, and his testimony, which was uncontradicted, was in substance as follows: As an

investor in municipal securities he purchased the bonds in New York City in the regular course of business, paying therefor ninety-seven per cent. of their face value with accrued interest. (The check by which payment was made was produced in evidence.) None of the bonds, nor any of the coupons attached to them, was then due. He read one of the bonds, and relied upon the recital therein and the certificates thereon, and also upon the written opinion of a reputable attorney of wide experience in matters pertaining to municipal securities, to the effect that the issuance of the bonds had been regularly authorized, and that they were in due form and were legally binding upon the district. At the time of the purchase the banker through whom it was made told him that a suit had been brought to prevent the registration of the bonds by the state officers, and that it had been dismissed, but he did not otherwise hear or know of their validity being questioned until three or four months thereafter. When due effect is given to the recital in the bonds, and to the certificates of the State officers indorsed thereon (see *Hughes v. Livingston County*, 3 C. C. A. 541, 104 Fed. 306; *Platt v. Hitchcock County*, 71 C. C. A. 640, 139 Fed. 929; *Gamble v. Rural Ind. School Dist.*, 76 C. C. A. 539, 146 Fed. 113), it is quite plain that this testimony was sufficient to sustain a finding that Shepard was an innocent purchaser for value before maturity, unless there be merit in some of the contentions now to be considered.

"The bonds contained the recital, 'Total amount of bonds issued by said district \$24,000,' and it is said that this, together with the last assessment of the taxable property of the district, disclosed that the statutory limitation upon the amount of bonds which could be issued had been

exceeded. The contention is disposed of by the ruling which sustains the validity of the amendatory act of 1887, whereby the limitation was increased from five to ten per cent. of the assessed valuation. This issue of bonds amounted to \$22,000 and with a prior issue of \$2,000 made the total stated in the recital, which was within the increased limitation.

"The first section of the statute declared that school districts could issue bonds 'for the purpose of purchasing a site for, and erecting thereon, a schoolhouse or schoolhouses, and furnishing the same,' and because these bonds recited that they were issued 'for the purpose of building a schoolhouse,' it is said that they disclosed that they were not issued for a lawful purpose. Differently stated, the contention is that the statute permitted the issuance of bonds for the threefold purpose of purchasing a site, erecting a schoolhouse thereon, and furnishing the same, but not for the single purpose of erecting a schoolhouse, though the district may have had a suitable site therefor and other means of furnishing the building when erected. The statute was not so unreasonable. Its purpose, as stated in section 3, was to enable a school district to issue bonds 'to purchase a site for, or erect a schoolhouse, or houses, or for furnishing the necessary furniture and apparatus for the same, or for all of these purposes.' Whether or not the statement in the bonds of the purpose for which they were issued sufficiently conformed to the statement in the proceedings leading to their issuance is not material to the present inquiry because there was evidence to sustain a finding that Shepard purchased without notice of the want of conformity, if there was such." *School Dist. No. 11, Dakota County, Neb. v. Chapman, et al.*, 82 C. C. A. 35, 152 Fed. 887.

D. The Municipal Decision.

2. *When the Municipality Estopped by Matters of Record or Otherwise than by Recitals in its Bonds.*

Precedent conditions; estoppel.

527. (Ky. 1871.) "Without legislative authority a municipal corporation, like a county, may not subscribe to the capital stock of a railroad com-

pany, and bind itself to pay its subscription, or issue its bonds in payment; and if it does, the purchaser of such bonds is affected by the want of authority to make them. But it does

not follow from this that when the legislature has given its sanction to the issue of bonds, provided that before their issue certain things shall be done by the officers, or the people of the county, the bonds can always be avoided in the hands of an innocent purchaser by proof that the county officers of the people, have not done, or have insufficiently done the things which the legislature required to be done before the authority to subscribe, or to issue bonds, should be exercised. A purchaser is not always bound to look farther than to discover that the power has been conferred, even though it be coupled with conditions precedent. If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote has been taken as directed by law and what the vote was. When, therefore, they make a subscription, and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power has been fulfilled."

Retention of benefits; acquiescence.

"The county received in exchange for the bonds a certificate for the stock of the railroad company, which it held about seventeen years before the present suit was brought, and which it still holds. Having exchanged the bonds for the stock, can it retain the proceeds of the exchange, and assert against a purchaser of the bonds for value that though the legislature empowered it to make them, and put them upon the market, upon certain conditions, they were issued in disregard of the conditions? We think they cannot, and, therefore, that the third plea cannot be sustained." *Pendleton County v. Amy*, 13 Wall. 297, 20 L. Ed. 579.

Waiver by county of strict compliance with conditions.

528. (Ill. 1876.) "In the present case, the county, by an order in writing made on the sixth day of October, 1871, expressly agreed, for reasons satisfactory to itself, to extend the time of completing the road from the twenty-seventh day of December, 1871, to the first day of February, 1872. Before that time — to wit, on the nineteenth day

of January, 1872 — it declared the road to be completed to its satisfaction, delivered its bonds to the company, and received its stock in return, which it still holds and owns. That this constitutes a waiver and an estoppel, which under ordinary circumstances would prevent the obligor from raising the objection that the contract had not been performed in time, the authorities leave no doubt." *County of Randolph v. Post*, 93 U. S. 502, 23 L. Ed. 957.

Voting subscription; receiving stock; paying interest on bonds, etc.

529. (Kan. 1875.) A county which had subscribed to the stock of a railroad company in pursuance of a vote of its electors issued its bonds therefor, received and held the stock, the road was built, and the county paid interest on the bonds for a time. These facts are considered as raising a strong equity in favor of a bona fide holder of the bonds. *Comrs. of Johnson County v. January*, 94 U. S. 202, 24 L. Ed. 110.

County bound by its assumption of indebtedness.

530. (Mo. 1877.) County funding bonds were issued by the presiding justice and clerk of the County Court, under an order of the County Court, directing that funding bonds be issued "for the purpose of paying said coupons, keeping the faith of the county, protecting and preserving her credit; and also that the next levy of taxes upon said township may not prove burdensome." Held, that the bonds were valid obligations of the county.

"County funding bonds' were to be issued to protect the faith and preserve the credit of the county. The law under which the action was taken was one authorizing counties 'to fund any and all debts they may owe.' The County Court may have been mistaken in supposing that the interest in arrears was a county debt; but, however that may be, they clearly assumed that it was, and acted accordingly." *County of Cass v. Shores*, 95 U. S. 375, 24 L. Ed. 419.

Decision by authorized official.

531. (N. Y. 1878.) "The county judge was the officer charged by law with the duty to decide whether the bonds could be legally issued, and his judgment was conclusive until reversed

by a higher court." *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404.

Erroneous canvass of vote; determination of result of election in favor of bonds shown by minutes of board of commissioners; estoppel.

532. (Kan. 1878.) An act of the legislature of Kansas authorized the board of commissioners of any county, etc., to subscribe to the capital stock of any railroad company, and issue the bonds of such county in such an amount as they may deem best in payment of said stock, but only when authorized by a majority vote of the qualified electors of the county on submission of the question by the board. Under said enabling act, the board of commissioners of Bourbon county submitted to the electors the question of such subscription to the stock of the T. & N. Railroad Company, and issuing of bonds of the county therefor, and, on canvass of the returns, the board found and declared, by an entry on the minutes of the board, that a majority of the votes were in favor of the subscription, and the bonds were issued, purporting to have been issued by the order of the board, payable to the T. & N. Railroad Company or bearer. They contained no recitals.

In an action on interest coupons of such bonds by a bona fide holder, held, "If they (the bonds) did contain a recital that an election had been held, and that a majority had voted for the issue of the bonds, the recital would have been conclusive upon the county, and a purchaser would have needed to look no farther than to the act of the legislature. This is according to all our decisions. But in the absence of any recital it may be conceded that he was bound to inquire whether a majority vote had been returned for the issue of the bonds. But where was he to inquire? Plainly only of the board whose province it was to ascertain and declare the result of the election. Had he gone to their records, they would have shown that the popular vote was in favor of the bond issue. They showed nothing else until 1872. He was not bound to canvass the vote for himself, or to revise and correct a mistaken canvass, any more than he was bound to inquire into the qualification of the electors. And if, relying upon the canvass of the board and the declared result, he accepted the obligations of the county, it would be

a strange doctrine were we to hold that a second canvass, made many years afterwards, could reverse the first and annul rights that had been acquired under it." There is no such law. For all legal purposes the result of an election is what it is declared to be by the authorized board of canvassers empowered to make the canvass at the time when the returns should be made, until their decision has been reversed by a superior power, and a reversal has no effect upon acts lawfully done prior to it. The county of Bourbon is therefore estopped, in a suit by a bondholder whose bonds were issued in 1870, from asserting that the canvass of 1867 was incorrect, and that in fact no majority of the qualified electors had voted in favor of the issue of the bonds." *Block v. Comrs.; Comrs. v. Block*, 99 U. S. 686, 25 L. Ed. 491.

Township estopped by acts of its officers.

533. (N. J. 1879.) It was objected to the validity of the bonds: "1. That they could not be competently issued until the route of the road had been surveyed and the termini thus fixed. 2. That no terminus at Pompton was ever so fixed or designated as to be effectual. 3. That, when the route of the road was changed, and fixed pursuant to the act amending the charter of the company, the necessary consideration for the bonds became, in a vital part, impossible or failed, and that the bonds were thereupon void." The bonds were held by a bona fide purchaser.

"If any error or wrong was committed in issuing these bonds, it was the act of the agents of the plaintiffs in error. Where one of two innocent persons must suffer a loss, and one of them has contributed to produce it, the law throws the burden upon him and not upon the other party. *Hearn v. Nichols*, 1 Salk. 289; *Merchants' Bank v. State Bank*, 10 Wall. 604." *Pompton v. Cooper Union*, 101 U. S. 196, 25 L. Ed. 803.

County held estopped by repeated acts of the county court showing acquiescence; fraud of railroad company subsequently discovered.

534. (Tenn. 1880.) "The defendants in error obtained the bonds in suit from the Paducah and Memphis Railroad Company, paying value therefor,

and, so far as the record discloses, without any reason to suspect their payment would be resisted by the county. In view, then, of the conduct throughout all these proceedings of those who represented the county of Tipton, it is estopped, by every consideration of law, justice, and fair dealing, from disputing its liability to defendants in error upon the bonds in suit. The discovery by the county, in February, 1875, of fraud and corrupt practices upon the part of the Mississippi River Railroad Company, in procuring the issue of the bonds in 1869, cannot be permitted to affect the rights of those who had, in good faith, acquired the bonds in reliance upon the explicit assurance which the county, in effect, gave in October, 1871, that it would provide for the payment of the bonds and their coupons. The defendants in error having obtained the bonds under the circumstances which have been detailed, may rightfully invoke, in support of their claims, any facts which would have estopped the county from disputing the claim of the Paducah and Memphis Railroad Company, had the latter company never parted with the bonds." *County of Tipton v. Locomotive Works*, 103 U. S. 523, 26 L. Ed. 340.

Authority to aid railroad "into, through, or near" township; determination of voters and officers as to proximity of railroad; payment of interest; estoppel.

535. (Ga. 1883.) Bonds were issued by the County Court of Lafayette county in payment of a subscription to the capital stock of the St. Louis & St. Joseph Railroad Company. They recited that they were authorized by a vote of the people, and that they were issued in pursuance of an order of the County Court by authority of a certain act referred to.

In an action on interest coupons from such bonds, it was urged as a defense that the County Court had no authority to make the subscription or issue the bonds, for the reason that the road of said company was not built "into, through or near such township," a condition contained in the act.

"The word 'near' is relative in its signification. What would be near in

one locality would not be in another. Each case must be governed by its special circumstances. The main inquiry is whether a railroad, when constructed, would be near enough to contribute to the convenience or advance the business interests of the particular township involved. It cannot be said, as matter of law, that this road was not near enough to Lexington township to bring about such results. That was a question which the people of that township and the County Court of the county were qualified and, within reasonable limits, authorized to settle for themselves. Their action in favor of a subscription was supplemented by payment of interest for three years. Under these circumstances, as between the township and a bona fide holder for value, as the plaintiff is conceded to be, the courts should acquiesce in the determination by the qualified voters and the local authorities, that the road in question was near to Lexington township." *Kirkbride v. Lafayette County*, 108 U. S. 208, 2 Sup. Ct. Rep. 501, 27 L. Ed. 705.

Decision of the county board binding on the county.

536. (N. J. 1886.) "The Court of Errors of New Jersey has recently decided in *Cotton v. New Providence*, 18 Vroom. (47 N. J. L.), 401, following the rule laid down in *Mutual Benefit Life Ins. Co. v. Elizabeth*, 13 Vroom. (42 N. J. L.), 235, that purchasers of bonds of the issue of those now in suit had the right to rely on the decision of the commissioners as conclusive in respect to the amount that could be put out under the statute. The language of the court is: 'When they (commissioners) issued bonds they averred that the issue was within the limit. Construing the act by the rule laid down in the cases cited (*Ins. Co. v. Elizabeth*), the legislative intent that their decision on this subject should be final appears. The holder of the bonds had the right to rely thereon. For this reason I feel constrained to hold that bonds issued beyond the limit would be enforceable.'" *New Providence v. Halsey*, 117 U. S. 336, 6 Sup. Ct. Rep. 764, 29 L. Ed. 904.

E. Cases in Which Municipalities are Not Estopped; Purchasers of Bonds Charged with Knowledge of Illegality, When.

Effect of absence of authority.

537. (Ill. 1876.) "We have held that there can be no bona fide holding where the statute did not in law authorize the issue of the bonds. The objection in such case goes to the point of power. There is an entire want of jurisdiction over the subject. It is not the case of an informality, an irregularity, fraud, or excess of authority in an authorized agent. Where there is a total want of authority to issue the bonds, there can be no such thing as a bona fide holding." *Township of East Oakland v. Skinner*, 94 U. S. 255, 24 L. Ed. 125.

Absence of authority by reason of failure of legislature to comply with constitutional requirements in passage of act.

538. (Ill. 1876.) The act of the legislature relied upon as authority for the issue of the bonds in question, not having been passed according to the requirements of the Constitution of the State, was held to be void. In such case, no estoppel can exist as against the township, even in favor of bona fide purchasers of the bonds. There can be no estoppel in the way of ascertaining the existence of a law.

"Want of such authority is a fatal objection to their validity, no matter under what circumstances the holder may have obtained them." *Town of South Ottawa v. Perkins; Supervisors of Kendall County v. Post*, 94 U. S. 260, 24 L. Ed. 154.

Premature issue of bonds; notice on face of bonds of invalidity; notice of provisions of enabling act; notice to holder of coupons.

539 (Kan. 1876.) The act relied upon as authority for the issuance of the bonds was passed and approved March 1, 1872. It provided that no bonds should be issued under its authority until the question of their issue had been submitted to the legal voters of the town at an election of which thirty days' notice had been given. An election was held on April 8, 1872, and bonds were issued bearing date of April 15, 1872, containing a statement of the purpose for which they were issued, and referring to the act under which they were issued and the result of the vote. Held, no valid

notice of the election could be given until the act went into effect. The bonds therefore carried on their face evidence that the law had not been complied with.

False recitals of the performance of conditions precedent, on the face of bonds, will not protect a holder when it also appears from the bonds that the law has not been complied with.

"Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements."

"This suit was brought upon coupons detached from the bonds purchased by the plaintiff in error before maturity, but upon their face they refer to the bonds, and purport to be for the semi-annual interest accruing thereon. This puts the purchaser upon inquiry for the bonds, and charges him with notice of all they contain." *McClure v. Township of Oxford*, 94 U. S. 429, 24 L. Ed. 129.

Constitutional debt limit in absence of recitals.

540. (Ill. 1880.) Bonds were issued by the city of Litchfield in excess of the limitation contained in the Constitution of the State, but neither the bonds in suit, nor the ordinance directing their issue, contained any recitals importing compliance with such limitation. Held, in an action upon interest coupons of such bonds, that a purchaser of the bonds will be bound to take notice of the constitutional limitation upon the municipal indebtedness, and of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city; and that, in the absence of such recitals in the bonds, or the ordinance authorizing their issue, the city was not precluded from showing that the limitation had been exceeded in the issuance of the bonds. A number of cases distinguished as to the effects of recitals in bonds. *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138.

No estoppel if no legal authority.

541. (W. Va. 1882.) "There having been a total want of power to issue the bonds originally, under any circumstances, and not a mere failure to comply with prescribed requirements or conditions, the case is not one for applying to the city, under any state of facts, any doctrine of estoppel or ratification, by reason of its having paid some installments of interest on the bonds (*Loan Assn. v. Topeka*, ubi supra), or by reason of any of the acts of its officers or agents in dealing with the property covered by the deed of trust. No such acts can give validity to the statute or to the bonds, however they may affect the status of the property dealt with or the relation of the city to such property." *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. Rep. 442, 27 L. Ed. 238.

Absence of authority to issue; notice of, on face of bonds.

542. (La. 1883.) "Every purchaser of such a bond is chargeable in law with notice of the want of power in the municipal authorities to bind the body politic in that way."

"These bonds carried on their face full notice to every purchaser that they were issued for a purpose not authorized by law, that is to say, to aid a railroad corporation." *Lewis v. City of Shreveport*, 108 U. S. 282, 2 Sup. Ct. Rep. 634, 27 L. Ed. 728.

Absence of authority; no estoppel by recitals to show; doctrine of estoppel by recitals discussed.

543. (Ohio, 1884.) "The facts which a municipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a bona fide holder, to question, in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; not merely for themselves, as the ground of their own action, in issuing the bonds, but, equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it. Had the statutes of Ohio conferred upon a township in Delaware county

authority to make a subscription to the stock of this company, upon the approval of the voters at an election previously held, then a recital by its proper officers, such as is found in the bonds in suit, would have estopped the township from proving that no election was in fact held, or that the election was not called and conducted in the mode prescribed by law; for in such case it would be clear that the law had referred to the officers of the township not only the ascertainment, but the decision of the facts involved in the mode of exercising the power granted. But in this case, as we have seen, power in townships to subscribe did not come into existence, that is, did not exist, except where the county commissioners had not been authorized to make a subscription."

"Porter township is estopped by the recitals in the bonds from saying that no township election was held, or that it was not called and conducted in the particular mode required by law. But it is not estopped to show that it was without legislative authority to order the election of August 30, 1851, and to issue the bonds in suit. The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals; but the power existing, the municipality may be estopped by recitals to prove irregularities in the exercise of that power; or, when the law prescribes conditions upon the exercise of the power granted, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will also be estopped by recitals which import such performance." *Northern Bank of Toledo v. Porter Township Trustees*, 110 U. S. 608, 4 Sup. Ct. Rep. 254, 28 L. Ed. 258.

Excessive issue; constitutional limit based on assessment; county not estopped to show; doctrine of estoppel discussed; recitals; record of assessment as notice.

544. (Nebr. 1884.) A statute in Nebraska limited the amount of bonds that might be issued by a county in aid of the construction of railroads to ten per cent. of the assessed valuation of the property in the county for taxation. The county commissioners of Dixon county submitted to the electors of the county the question of is-

suing \$87,000 of bonds to aid in the construction of the C. C. & B. H. Railroad, which was carried by the necessary two-thirds vote. The assessed valuation of taxable property in the county was \$587,331. The bonds contained recitals as follows: "This bond is one of a series of eighty-seven thousand dollars issued under and in pursuance of an order of the county commissioners of the county of Dixon, in the State of Nebraska, and authorized by an election held in the said county on the twenty-seventh day of December, A. D. 1875, and under and by virtue of chapter 35 of the General Statutes of Nebraska, and amendments thereto, and the Constitution of the said State, article XII, adopted October, A. D. 1875." Held, that the county was not estopped by these recitals from denying the legality of the bonds. Recitals in municipal bonds, importing that everything necessary by law to be done has been done, and every fact necessary by law to have existed did exist, to make the bonds lawful and binding, can create no estoppel when it also appears upon the face of the bonds that the law has not been complied with.

"A certificate reciting the actual facts, and that thereby the bonds are conformable to the law, when, judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law."

"And the estoppel does not arise, except upon matters of fact which the corporate officers had authority by law to determine and to certify. It is not necessary, it is true, that the recital should enumerate each particular fact essential to the existence of the obligation. A general statement that the bonds have been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify. A determination and statement as to the whole series, where more than one is involved, is a determination and certificate as to each essential particular. But it still remains that there must be authority vested in the officers, by law, as to each necessary fact, whether enumerated or nonenumerated, to ascertain and determine its existence, and to guarantee to those dealing with them

the truth and conclusiveness of their admissions."

"If the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be, that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow, that all persons claiming under the exercise of such a power might be put to proof of the fact, made a condition of its lawfulness, notwithstanding any recitals in the instrument."

"If the officers authorized to issue bonds, upon a condition, are not the appointed tribunal to decide the fact, which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject.

"This is the rule which has been constantly applied by this court in the numerous cases in which it has been involved. The differences in the result of the judgments have depended upon the question, whether, in the particular case under consideration, a fair construction of the law authorized the officers issuing the bonds to ascertain, determine and certify the existence of the facts upon which their power, by the terms of the law, was made to depend; not including, of course, that class of cases in which the controversy related, not to conditions precedent, on which the right to act at all depended, but upon conditions affecting only the mode of exercising a power admitted to have come into being. *Marcy v. Township of Oswego*, 92 U. S. 637 (23 L. Ed. 748); *Comrs.*

of Douglas County v. Bolles, 94 U. S. 104 (24 L. Ed. 46); Comrs. of Marion County v. Clark, 94 U. S. 278 (24 L. Ed. 59); County of Warren v. Marcy, 97 U. S. 96 (24 L. Ed. 977); Pana v. Bowler, 107 U. S. 529 (2 Sup. Ct. Rep. 704, 27 L. Ed. 424).

"In the present case there was no power at all conferred to issue bonds in excess of an amount equal to ten per cent. upon the assessed valuation of the taxable property in the county. In determining the limit of power, there were necessarily two factors; the amount of the bonds to be issued, and the amount of the assessed value of the property for purposes of taxation. The amount of the bonds issued was known. It is stated in the recital itself. It was \$87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount, as fixed by reference to that record, that is made by the Constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment or determination as to that fact, is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary to the exercise of their functions, and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same source, and for themselves. The fact, as is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it." Marcy v. Township of Oswego (*supra*); Sherman County v. Simons, 109 U. S. 735 (3 Sup. Ct. Rep. 502, 27 L. Ed. 1093); Buchanan v. Litchfield, 102 U. S. 278 (26 L. Ed. 138), and National Bank v.

Porter Township, 110 U. S. 608 (4 Sup. Ct. Rep. 254, 28 L. Ed. 258), distinguished. Dixon County v. Field, 111 U. S. 83, 4 Sup. Ct. Rep. 315, 28 L. Ed. 360.

Effect of recitals; illegality appearing on the face of bonds.

545. (Kan. 1885.) "It is contended that the recital in the bond, that it is issued under the provisions of the act of 1866, is a recital that only twenty days' notice of the election was given. But the meaning of the act of 1866 was, that at least twenty days' notice should be given, and even if the recital amounted to a statement that the notice prescribed by that act had been given, it would not necessarily mean that exactly twenty days' or only twenty days' notice, had been given."

"Wherever the want of legislative authority appears by the face of the bond, taken in connection with the act which the bond mentions, every taker of the bond has notice of the want of power. But no such case is here presented. The bond recites the wrong act, but if that part of the recital be rejected, there remains the statement, that the bond 'is executed and issued' 'in pursuance to the vote of the electors of Anderson county, of September 13, 1869.'" Anderson County Comrs. v. Beal, 113 U. S. 227, 5 Sup. Ct. Rep. 433, 28 L. Ed. 966.

Authority cannot be created by recitals.

546. (Miss. 1885.) "Even a bona fide holder of a municipal bond is bound to show legislative authority in the issuing body to create the bond. Recitals on the face of the bond or acts in pais, operating by way of estoppel, may cure irregularities in the execution of a statutory power, but they cannot create it. If, as in the present case, legislative authority was wanting, the bond has no validity." Hayes v. Holly Springs, 114 U. S. 120, 5 Sup. Ct. Rep. 785, 29 L. Ed. 81.

Absence of recitals in bonds.

547. (N. J. 1885.) "In the bonds of Bergen county there are no recitals. The bank in taking them was bound to ascertain whether or not they were authorized." Merchants' Bank v. Ber-

gen County, 115 U. S. 384, 6 Sup. Ct. Rep. 88, 29 L. Ed. 430.

Act in excess of authority; certificate on back of bond by county judge of compliance with law, etc.; no estoppel thereby.

548. (Ky. 1886.) "The certificate of the judge of the County Court upon the back of each bond, that it was issued as authorized by the statute and by an order of the County Court in pursuance thereof, cannot estop the county to deny that the particular bond is void because the County Court, at the time of issuing it had exhausted the power conferred by the act of the legislature and the vote of the people. The certificate is not a recital in the bond. It is not the act of the County Court, is not under its seal, nor signed by its clerk; but is simply the certificate of the person holding the office of judge of that court. Neither the statute nor the vote of the people nor the order of the County Court, empowered him to make such a certificate, or to determine the question whether the County Court had exceeded the power conferred upon it. An officer's certificate of a fact which he has no authority to determine is of no legal effect." *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. Rep. 897, 29 L. Ed. 1026.

Different issues of bonds aggregating amount in excess of authority; which valid and which invalid; records as notice; certificate by county judge on back of bond not a recital in the bond; not authorized; no estoppel thereby.

549. (Ky. 1886.) When bonds have been issued at different times, but in the aggregate in excess of the amount authorized, "Then comes the question which of the bonds are valid and which invalid. We can have no doubt that the test is which were first delivered, if that can be ascertained, and without regard to the classification of bonds according to times of payment in the order of the County Court; for, as the County Court was authorized to determine at what time the bonds should be payable, any one, taking a bond signed by the presiding judge and the clerk and bearing the seal of the county had the right to presume that it was valid, provided the County Court had not already is-

sued bonds to the amount limited by the statute and by the vote."

"The certificate of the judge of the County Court upon the back of each bond, that it was issued as authorized by the statute and by an order of the County Court in pursuance thereof, cannot estop the county to deny that the particular bond is void because the County Court, at the time of issuing it, had exhausted the power conferred by the act of the legislature and the vote of the people. The certificate is not a recital in the bond. It is not the act of the County Court, is not under its seal, nor signed by its clerk; but is simply the certificate of the person holding the office of judge of that court. Neither the statute nor the vote of the people, nor the order of the County Court, empowered him to make such a certificate, or to determine the question whether the County Court had exceeded the power conferred upon it. An officer's certificate of a fact which he has no authority to determine is of no legal effect." *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. Rep. 897, 29 L. Ed. 1026.

Notice of requirements of law authorizing bonds; of constitutional provisions; absence of recitals.

550. (Ill. 1887.) Purchasers of bonds are bound to know the provisions and requirements of the law under which the bonds are issued, as well as any constitutional provisions affecting such laws or the power to issue securities, and the bonds in this case, containing no recital creating an estoppel in favor of a bona fide holder, they were held to be void. *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. Rep. 937, 30 L. Ed. 885.

Recitals in bonds create no estoppel if issued without authority.

551. (Miss. 1887.) A recital in bonds as follows:

"This bond is issued under and pursuant to the Constitution and laws of the State of Mississippi, the charter of the city of Aberdeen, and ordinances passed by the mayor and selectmen of the city of Aberdeen on the 26th of April, A. D. 1870," does not bind the city issuing them, if there is no legal authority for their issuance. *Katzenberger v. Aberdeen*, 121 U. S. 172, 7 Sup. Ct. Rep. 947, 30 L. Ed. 911.

Invalidity of bonds appearing upon their face.

552. (Ill. 1887.) "The judgment in this case is affirmed on the authority of *Crow v. Oxford*, 119 U. S. 215. See also *Post v. Supervisors*, 105 U. S. 667, 691. It appears on the face of the bonds sued for that the subscription was made under and by virtue of the act of February 18, 1857, and that the vote of the town was taken at a special town meeting called upon the 'application in writing of fifty legal voters of said town,' which is in accordance with the provisions of that act. The act of March 6, 1867, which the plaintiff now claims is sufficient to support the bonds, requires that the application for the town meeting shall be made by 'twenty voters and taxpayers.' The record does not show that any of those who signed the application for the meeting, at which the vote was taken were taxpayers. It thus appears from the bonds themselves not only that they were issued under the act of 1857, but that they were not issued under that of 1867." *Gilson v. Dayton*, 123 U. S. 59, 8 Sup. Ct. Rep. 66, 31 L. Ed. 74.

553. (Colo. 1889.) Recitals of matters of law do not create an estoppel, as all parties are equally bound to know the law. *Lake County v. Graham*, 130 U. S. 674, 9 Sup. Ct. Rep. 654, 32 L. Ed. 1065.

Conditions imposed by proposition voted upon; noncompliance with; absence of recitals in bonds; no estoppel.

554. (Ill. 1895.) In 1869 the laws of Illinois, acts of 1849 and 1857, authorized subscriptions by counties to the capital stock of railroad companies and the issuing of county bonds in payment for the same, but provided that no such subscription should be made nor bonds issued unless a majority of the voters of the county, according to the votes cast at a general election, shall vote for the same. An act of April 16, 1869, provided for registration of such bonds by the auditor of the State, but further provided that no such registration should be made "until after the railroad * * * shall have been completed, near to, or in such county * * * and cars shall have been run thereon * * * and any county * * * shall have the right * * * to prescribe

the conditions upon which subscriptions or donations shall be made. And such bonds, subscriptions or donations shall not be valid and binding until such conditions precedent shall have been complied with," and required the presiding judge of the County Court, immediately upon the completion of such conditions, to certify under oath to the auditor of the State, that all such preliminary conditions have been complied with, with a statement of the date, amount, number, maturity, and rate of interest of such bonds, and to what company and under what law issued.

A section of the Constitution of Illinois, which went into effect July 2, 1870, forbade municipal subscriptions to the stock of railroad corporations, but provided "that the adoption of this article shall not be construed as affecting the right of any municipality to make such subscriptions where the same have been authorized under existing laws by the vote of the people of such municipalities prior to such adoption."

On July 3, 1869, an election was held in Perry county, on submission by the County Court, on a proposition that the county subscribe for stock in the B. & S. I. Railroad Company, and issue bonds therefor, upon several conditions therein prescribed, resulting in favor of such subscription, etc. December 5, 1870, the County Court ordered the bonds to be issued and they were issued, bearing date January 1, 1871. December 5, 1870, the county judge made the required certificate to the auditor of the State who certified on the bonds that they had been registered in his office pursuant to the provisions of an act, entitled "An act to refund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16, 1869.

In an action upon the bonds held, that they were invalid.

"Looking then at the act of April 16, 1869, and the Constitution of Illinois, there is no escape from the conclusion that the condition precedent, imposed by popular vote, that no bonds should be issued until or unless the company located its machine shops at Duquoin, was in full force when the election was ordered and held, as well as when the constitutional limitation upon municipal sub-

scriptions was prescribed; and that both the County Court by its order of December 5, 1870, directing the issue and delivery of the bonds, and the county officers, who executed them, violated their duty as prescribed by the statute."

"But it is urged that the bonds having been executed and issued by those whose duty it was to execute and issue them whenever that could be rightfully done, the county is estopped to plead their invalidity as between it and a bona fide purchaser for value. This argument would have force, if the material circumstances bringing the bonds within the authority given by law were recited in them. In such a case, according to the settled doctrines of this court, the county would be estopped to deny the truth of the recital as against bona fide holders for value. But this court, in *Buchanan v. Litchfield*, 102 U. S. 278, 292 (26 L. Ed. 138), upon full consideration, held that the mere fact that the bonds were issued, without any recital of the circumstances bringing them within the power granted, was not in itself conclusive proof in favor of a bona fide holder, that the circumstances existed which authorized them to be issued."

"In the bonds here in question there are no recitals precluding inquiry as to the performance of the conditions upon which the people, after the passage of the act of April 16, 1869, voted in favor of a subscription to be paid by bonds of the county. Those recitals only imply that the bonds were issued under the authority and in accordance with the acts of 1857 and 1849." *Citizens' Saving & Loan Assn. v. Perry County*, 156 U. S. 692, 16 Sup. Ct. Rep. 547, 30 L. Ed. 585.

No estoppel to show absence of authority; conditions prescribed by legislature.

555. (Ill. 1896.) "It must be admitted, as well-settled law, that where there is total want of power to subscribe for stock and to issue bonds in payment, a municipality cannot estop itself from raising such a defense by admissions, or by issuing securities negotiable in form, nor even by receiving and enjoying the proceeds of such bonds. So, too, it may be admitted that, even where the power to subscribe for stock and to issue bonds in payment was validly granted, yet

where the right to exercise the power has been subjected to conditions prescribed by the legislature, the municipality cannot dispense with or waive such conditions." *Graves v. Saline County*, 161 U. S. 359, 16 Sup. Ct. Rep. 526, 40 L. Ed. 732.

Absence of authority to issue bonds; recitals of facts which are matter of record open to all inquirers; organization of county; bonds issued before time fixed by law.

556. (Kan. 1893.) "No doctrine is better established than that a purchaser of municipal bonds is bound to ascertain if the municipality has authority to issue such securities, and that no recital contained in a municipal bond can cure such a defect as an utter want of power in the municipality to execute it."

"It has frequently been held that municipalities will not be estopped by recitals contained in bonds unless the recitals relate to matters of fact which it may fairly be presumed that the officers of the municipality were left to determine." "And the later decisions on this subject distinctly announce that recitals cannot be relied upon as an estoppel, where the facts recited are matters of public record, and are open to the inspection of every one who is disposed to make inquiries." "In the present case the fact which rendered the bonds invalid was a matter which could easily have been ascertained from the public records of the State."

Purchasers of a county's bonds are bound to know, as a matter of law, when the county was organized and what its powers are. *Coffin v. Board of Comrs. of Kearney County*, 6 C. C. A. 288, 57 Fed. 137.

Invalidity appearing on face of bonds.

557. (Mich. 1896.) When bonds show upon their face that at the time of their issuance the conditions prescribed by the enabling act could not have been complied with, they will be held to be void, notwithstanding the recitals in the bonds importing compliance with the law. *Manhattan Company v. City of Ironwood*, 20 C. C. A. 642, 74 Fed. 535.

Notice of defects in proceedings; no estoppel by recitals.

558. (Kan. 1898.) "Passing to the merits of the controversy, it may be

conceded at the outset that, but for the curative act of February 27, 1889, referred to in the foregoing statement, the plaintiff company would not be entitled to recover on the agreed facts. Before purchasing the bonds in question, it was in possession of, and presumably had examined, the transcript of the proceedings by the officers of the municipality in pursuance of which the securities were issued. It was also bound to take notice of the provisions of the law under which they were issued, and of the taxable valuation of property in the city of Attica, as disclosed by the assessment for the year 1888,—that being the last preceding annual assessment. *Dixon County v. Field*, 111 U. S. 83, 93, 4 Sup. Ct. Rep. 315; *Sutliff v. Commissioners*, 147 U. S. 230, 235, 13 Sup. Ct. Rep. 318; *Lake County v. Graham*, 130 U. S. 682, 683, 9 Sup. Ct. Rep. 654. When it purchased these bonds therefore, the plaintiff must be presumed to have known of at least two defects in the proceedings taken to authorize their issue, namely, that twenty days' notice of the election called to ascertain the will of the people on the proposition to issue bonds had not been given as the law required; and that the interest on the bonds at 7 per centum exceeded by \$423.30, 1 per cent. of the taxable value of city property, as shown by the last assessment. Under these circumstances it is obvious that the defects in question were not cured by the broad recitals which the bonds contained, nor by the certificate of the State auditor as to their legality, and that they can only be sustained as valid obligations of the municipality, by virtue of the curative act heretofore mentioned." *Springfield Safe Deposit & Trust Co. v. City of Attica*, 29 C. C. A. 214, 85 Fed. 387.

Absence of recitals in bonds or reference to enabling statute; legality not presumed from certificate of registration.

559. (Ill. 1899.) "Per curiam. This action was brought to recover the amount of bonds issued in the name of Perry county, Illinois, to the Belleville & Southern Illinois Railroad Company or bearer, in discharge of a subscription made in the name of the county to the capital stock of the railroad company. The case is governed in all respects by the decision

of the Supreme Court, in *Citizens' Savings & Loan Assn. v. Perry County*, 150 U. S. 692, 15 Sup. Ct. 547, where coupons from the same series of bonds were declared invalid. It is urged, but we cannot see, that that decision is inconsistent with the later opinions of the Supreme Court in *City of Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. Rep. 613, and *Graves v. Saline County*, 161 U. S. 359, 16 Sup. Ct. Rep. 526, and of this court, in *Wesson v. Saline County*, 34 U. S. App. 680, 20 C. C. A. 229, and 73 Fed. 917. In those cases the recitals in the bonds showed compliance with all statutes relating to the subject, while the recital in the bonds in suit contain no reference to the act of April 16, 1869; and that compliance with that act was necessary, and is not shown by, or to be inferred from, the registration or certificate of registration of the bonds, was decided in *German Sav. Bank v. Franklin County*, 128 U. S. 526, 539, 9 Sup. Ct. Rep. 159, and reaffirmed in *Citizens' Savings & Loan Assn. v. Perry County*, supra. The judgment below is affirmed." *Bolles v. Perry County*, 34 C. C. A. 478, 92 Fed. 479.

No estoppel to question legal existence or constitutionality of statute relied on as authority for taxation.

560. (N. Car. 1899.) "The board of commissioners of the town of Oxford cannot, by its action, by its agreement, or consent judgment, or the payment of interest on the bonds, estop that municipality from ascertaining the legal existence or constitutionality of an act of the general assembly of North Carolina, under which it is claimed that its inhabitants are liable to taxation." Board of Comrs. of Oxford, N. Car., et al., v. Union Bank of Richmond, Va., 37 C. C. A. 493, 96 Fed. 293.

Excessive issue shown on face of bonds; purchaser not protected by recitals; must take notice of assessment-rolls.

561. (Colo. 1899.) "The contention of the plaintiff in error is that the recital in the bonds that 'all of the requirements of said laws have been fully complied with by the proper officers in issuing these bonds, and all of said series of twenty bonds,' estops the defendant from setting up the defense that there was an overissue of

nearly four times the amount these laws authorized this district to issue. As each of the bonds recites on its face that it is one of a series of 20 bonds of \$500 each, every purchaser was charged with full notice that the district had issued \$10,000 of these bonds, and, as the demurrer admits that this was nearly four times as much as the defendant had, under the laws, authority to issue, the only question to be determined is whether the recital in the bonds that 'all the requirements of said laws have been fully complied with,' relieved the purchaser from examining the record of the assessment for the purpose of ascertaining whether the \$10,000 indebtedness thus incurred did not exceed the $3\frac{1}{2}$ per cent. of the assessed valuation of all the taxable property in the district at the time they were issued. That it is the duty of the purchaser upon this state of facts to make such examination is settled by repeated decisions of the Supreme Court of the United States."

A number of cases referred to and discussed. *Geer v. School District No. 11, Ouray County, Colo.*, 38 C. C. A. 392, 97 Fed. 732.

Bonds refunding a debt in part not debt of the city; no estoppel by recitals in bonds; holder charged with notice of records disclosing invalidity of debt refunded; no authority in officers to make certificate of character of debt.

562. (Cal. 1899.) Bonds in the amount of \$360,000 had been issued by the mayor and common council of the city of Santa Cruz, purporting to have been issued for the purpose of refunding the bonded indebtedness of said city. The indebtedness so refunded consisted of \$271,000 of outstanding bonds of the city and \$89,000 of mortgage bonds, which had been executed by, and made a lien upon the water-works system of the City Water Company of Santa Cruz, which water-works system was thereafter conveyed by the company to the city, subject to the lien of the mortgage bonds.

The refunding bonds recited that they were issued in pursuance of and in conformity with the provisions of an act of the legislature, approved March 1, 1893, which the court held,

contained no express grant of power to issue any bonds, but did impliedly authorize the issuance of refunding bonds for the purpose of refunding the outstanding bonds and warrants of the city, provided a majority of the electors of the city should vote in favor of such refunding upon submission of the question to them in the mode prescribed in the act. The bonds contained also further recitals importing full compliance with the law and the legality of the indebtedness refunded. The question of issuing the bonds to refund the city bonds and the water company's bonds was submitted to the electors by ordinance adopted February 26, 1894, and the result was in favor of the proposed refunding. Held, that the said act of March 1, 1893, conferred no authority for the issuance by the city of any bonds for the purpose of refunding the indebtedness of the water company. Held, further, that as the bonds issued for that purpose were in no way segregated from the others of the same issue, the plaintiff could only be permitted to recover by sustaining his contention that he was a bona fide purchaser without notice of the infirmity in the bonds. Held, also, that as the power conferred by the act on the mayor and council could only be exercised at a meeting of the municipal board by order, ordinance, or resolution, and was in this instance by ordinance, which was a part of the public records of the city, and which, by its charter, were required to be kept "in large, well-bound, uniform, and suitable books," the record of the ordinance was intended under the law to disclose to all the world the specific indebtedness that it was proposed to refund, and that the officers impliedly charged with the issuance of the bonds were not authorized to make any certificate or representations to prospective purchasers, in respect to the character of the debt refunded. Held, also, that as the statute required the specific indebtedness intended to be refunded to be entered upon the records of the governing body of the city, the plaintiff was bound by what such records disclosed and could not recover on the ground of being a bona fide holder. *City of Santa Cruz v. Waite*, 39 C. C. A. 106, 98 Fed. 387.

CHAPTER VIII.

RATIFICATION OF MUNICIPAL BONDS ILLEGALLY ISSUED.

- A. Ratification by acts of the body issuing them; retention of proceeds, payment of interest, etc.
- B. Ratification by legislative enactment; constitutionality of such legislation.

Municipal bonds issued irregularly under existing legal authority, but under such circumstances or conditions that they would not be binding obligations of the municipality, and in some cases bonds issued without existing authority of law, and therefore illegal and void, may nevertheless be validated by some method of ratification.

The invalidity arising from irregularities in the proceedings or issuance may often be cured by the subsequent acts of the duly authorized municipal officers with the expressed or presumed acquiescence of the taxpayers, such as the retention and enjoyment of the proceeds of the bonds, the payment of interest or part of the principal, or the levying of taxes therefor, or the renewal or refunding of the debt, and such invalidity may, in some cases, be cured by act of the legislature.

The invalidity arising from the absence of legal authority cannot be cured by any acts of the municipality alone, but such cure may be accomplished in many cases by act of the legislature, when no constitutional provision inhibits such legislation.

Such ratification may be effected by express declaration of the legislature or by recognition of validity from which ratification may be implied. Of course the legislature cannot so validate bonds which it could not originally have authorized.

A. Ratification by Acts of the Body Issuing Them; Retention of Proceeds, Payment of Interest, etc.

Ratification by city, under curative act, of subscription made without legal authority.

563. (Ind. 1860.) The council of the city of Jeffersonville, supposing it had legal authority to make a subscription on behalf of the city to the stock of a railroad company, and to issue bonds of the city therefor, on petition of three-fourths of the legal voters of the city, but in fact having no such legal authority, accepted and acted upon such petition, and entered of record its finding that the petition was

signed by three-fourths of the legal voters of the city. Subsequently the legislature of the State passed an act by which it was provided that the council of any city which had contracted such obligations on the supposition that it was authorized so to do under the provisions of such former law might "At any time after the passage of this act ratify and affirm such subscription;" and upon such ratification that "such subscription and the obligations and liabilities, and the corporate bonds or obligations issued or to be issued therefor by such city shall be valid." After the passage of that act the council adopted and entered of record a resolution, providing that the former contract between the city and railroad company "for \$200,000, be and the same is hereby confirmed and ratified;" and thereafter by direction of the council the mayor and city clerk executed and delivered to the railroad company the bonds, in each of which it was recited that it was issued by authority of the common council of the city, "three-fourths of the legal voters of the city having petitioned for the same, as required by the charter." It was urged as a defense that the requisite number of legal voters had not petitioned, and that after the passage of the ratifying act, the council had not determined the question as to the sufficiency of such petition. Held, "Taken together, we think the record of the resolution ratifying and confirming the contract, and the recital in the bonds furnish conclusive evidence in this case that the common council did not readjudicate the question, whether the requisite number of the legal voters of the city had signed the petition. Fraud is not imputed in this case, and it does not appear that it was even suggested at the trial in the court below that the board neglected that duty at the time the contract was confirmed; but the defense was, that the finding was erroneous because the petition, as a matter of fact, did not contain three-fourths of the legal voters of the city." *Bissell v. City of Jeffersonville*, 24 How. 287, 16 L. Ed. 664.

Subsequent acknowledgment of bonds.

564. (Pa. 1860.) The bonds in this case had every formality to give them currency.

"They were circulated for ten years, and were constantly acknowledged by the city, as its bonds, for the purposes for which they were issued. They are now in the hands of bona fide transferees, to whom they must be paid according to their terms. It would be inequitable, if the city could repudiate them at all, and more especially, if that were allowed to be done upon the ground of any fault in the corporation in their issue." *Henry Amey v. The Mayor, Aldermen, and Citizens of Allegheny City*, 24 How. 364, 16 L. Ed. 614.

Of bonds irregularly issued.

565. (Iowa, 1865.) The legislature of Iowa passed an act of confirmation legalizing an issue of bonds involved in this case.

"If the legislature possessed the power to authorize the act to be done, it could, by a retrospective act, cure the evils which existed, because the power thus conferred had been irregularly executed. The question with the legislature was one of policy, and the determination made by it was conclusive." *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177.

Proceedings irregular.

566. (Wis. 1866.) "All parties rested in the belief that these proceedings were according to law, and the securities were negotiated in good faith, and the city received the benefit of them. So far as the corporate authorities could ratify them, they have done it, by a series of unmistakable acts; by voting to levy taxes; redeeming a portion of the securities first issued, and exchanging the residue for new ones; issuing scrip in settlement of unpaid interest, and selling the securities obtained from the company by way of indemnity." *Campbell v. City of Kenosha*, 5 Wall. 194, 18 L. Ed. 610.

Payment of interest; retention of proceeds, etc.

567. (Ill. 1866.) Bonds were issued by a county in pursuance of an election called by the County Court, when it should have been called by the board of supervisors. The proper notice was given and the law was complied with in other respects. The county paid interest on the bonds for eight years, and then repudiated the debt. Held,

that by the payment of interest the levying and collection of taxes therefor and other acts of the county authorities, the bonds were ratified and validated in the hands of bona fide holder. *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556.

No ratification when no authority to perform act.

565. (Ill. 1870.) Bonds issued without legal authority cannot be ratified so as to bind the municipality for their payment by the subsequent acts of the officers or agents of the municipality.

"The supervisors possessed no authority to make the subscription or issue the bonds in the first instance without the previous sanction of the qualified voters of the county. The supervisors in that particular were the mere agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization." *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040.

No ratification when no authority.

560. (Kan. 1874.) "We do not attach any importance to the fact that the town authorities paid one installment of interest on these bonds. Such a payment works no estoppel. If the legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest which was equally unauthorized, cannot create of itself a power to levy taxes, resting on no other foundation than the fact that they have once been illegally levied for that purpose." *Loan Association v. Topeka*, 20 Wall. 655, 22 L. Ed. 455.

Issuance of new bonds a ratification.

570. (Ark. 1878.) A city issued its bonds to take up its outstanding scrip of questionable validity, because in a form prohibited by law, but which were given for value received by the city. Held to be a ratification and that the city was liable on the bonds. *Little Rock v. National Bank*, 98 U. S. 308, 25 L. Ed. 108.

Ratification by funding bonds of doubtful validity.

571. (Ill. 1880.) Jasper county issued funding bonds by authority of a

statute providing for funding indebtedness, which was binding and subsisting legal obligations against the county, and which was properly authorized by law when such funding should be first authorized by a vote of a majority of the legal voters of the county. The requisite vote was given. In a suit on interest coupons from the refunding bonds, the county defended on the ground that the original bonds which were so funded were invalid on account of irregularities in their issuance. Held, that the funding was a ratification of the debt.

"Whether these bonds were valid was, so far as any direct decisions were concerned, an open question, and certainly not free from doubt. Under these circumstances the question was directly put to the people of the county, in a manner authorized by law, whether they would recognize these bonds as 'binding and subsisting legal obligations' and issue in lieu of them other bonds having twenty years to run and bearing seven per cent. interest instead of ten; and they by their vote said they would. There is no complaint of any illegality in this election, or of fraud or imposition. So far as the record shows, the proposition to fund went from the county authorities to the bondholders, and not from the bondholders to the county. The facts were as well known to one party as the other. If the people intended to rely on their defenses to the old bonds, then was the time for them to speak and by their vote say they would not recognize them as binding obligations. By voting the other way they, in effect, accepted them as legal and subsisting for the purposes of the proposed extension of time at reduced interest, and said to the holders if their proposition was accepted, no question of illegality would be raised. Their offer having been accepted, they are now estopped from insisting upon an irregularity which they have by their votes voluntarily waived, with a full knowledge of the facts." *County of Jasper v. Ballou*, 103 U. S. 745, 26 L. Ed. 422.

No ratification when no legislative authority.

572. (La. 1883.) "Corporate ratification without authority from the legislature, cannot make a municipal bond valid which was void when is-

sued for want of legislative power to make it." *Lewis v. City of Shreveport*, 108 U. S. 282, 2 Sup. Ct. Rep. 634, 27 L. Ed. 728.

Payment of interest not a ratification of bonds issued in excess of authorized limit.

573. (Ky. 1886.) "Nor can the payment of interest on all the bonds have the effect of ratifying bonds issued beyond the lawful limit; for a ratification can have no greater force than a previous authority, and the county cannot ratify what it could not have authorized." *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. Rep. 897, 29 L. Ed. 1026.

574. (Tenn. 1886.) A County Court cannot give validity, by acts of ratification to bonds previously issued without authority, unless at the time of performing such acts of ratification, the court had power to issue bonds. *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. Ed. 178.

Decree of validity by consent of mayor of town; not a ratification; not res judicata; bonds held invalid.

575. (Tenn. 1888.) A consent decree of the Court of Chancery, entered in an action brought by taxpayers of a town to enjoin the collection of certain bonds on the ground of their invalidity (the bonds having been issued to aid a railroad company), and which decree embodied an agreement signed by the mayor of the town and an officer of the railroad company, can give no validity to the bonds.

"The act of the mayor, in signing that agreement, could give no validity to the bonds, if they had none at the time the agreement was made. The want of authority to issue them extended to a want of authority to declare them valid. The mayor had no such authority. The decree of the court was based solely upon the declaration of the mayor, in the agreement, that the bonds were valid; and that declaration was of no more effect than the declaration of the mayor in the bill in chancery, that the bonds were invalid. The adjudication in the decree cannot, under the circumstances, be set up as a judicial determination of the validity

of the bonds. (*Russell v. Place*, 94 U. S. 606; *Manhattan Life Ins. Co v. Broughton*, 109 id. 121, 125.) This was not the case of a submission to the court of a question for its decision on the merits, but it was a consent in advance to a particular decision, by a person who had no right to bind the town by such a consent, because it gave life to invalid bonds; and the authorities of the town had no more power to do so than they had to issue the bonds originally." *Nashville, etc., Railway Co. v. United States* (113 U. S. 261), distinguished. *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. Rep. 1101, 32 L. Ed. 77.

Unauthorized ratification.

576. (Iowa, 1892.) "It is hardly necessary to add that the payment of some installments of interest cannot have the effect of ratifying bonds issued beyond the constitutional limit; for a ratification can have no greater effect than a previous authority; and debts which neither the district nor its officers had any power to authorize or create cannot be ratified or validated by either of them, by the payment of interest, or otherwise." A number of cases discussed and distinguished. *Doon Township v. Cummins*, 142 U. S. 366, 12 Sup. Ct. Rep. 220, 35 L. Ed. 1044.

577. (Kan. 1893.) Bonds upon which interest has been paid for years will not, after a lapse of twenty years, be held void upon technical or trivial grounds. *Atchison Board of Education v. De Kay*, 148 U. S. 591, 13 Sup. Ct. Rep. 706, 37 L. Ed. 573.

Subscription to railroad stock upon condition; waiver of condition; payment of interest; refunding bonds; retention of stock.

578. (Ill. 1896.) Saline county, Ill., in pursuance of an election held according to law, issued its bonds to the St. L. & S. Railway Company, in payment of the county's subscription to the capital stock of the railway company, which bore date of January 1, 1872, payable twenty years after date, and were delivered to the railway company February 1, 1872, and were purchased in the open market by appellants for value and without notice of any defense, prior to the year 1876. The contract for the subscrip-

tion to the stock contained a condition which was never complied with, the condition being waived by the county commissioners.

By the act of April 16, 1869, it was provided that "any county, township, city or town shall have the right, when making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds and subscriptions or donations shall be made, and such bonds, subscriptions or donations shall not be valid and binding until such conditions precedent shall have been complied with."

The Constitution of Illinois, which took effect July 2, 1870, provided as follows: "No county, city, town, township or other municipality shall ever become subscribers to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation; Provided, however, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized under existing laws, by a vote of the people of such municipalities prior to such adoption."

The election was held October 9, 1868, and the subscription to the stock was made January 15, 1870. The validity of said bonds was continually recognized by the county by payment of interest thereon and by refunding the same by issuing new bonds in July, 1885, in pursuance of a vote of a majority of the electors of the county and the county has always retained the stock in the railway company. This action involved the refunding bonds and they were held to be valid in the hands of a bona fide purchaser.

"If the present case stood only on the footing of the original conditional contract of subscription we would be compelled to follow the holding of the Supreme Court of Illinois, and to hold that the original bonds were uncollectible even by innocent holders. But we have here an additional feature, not present in the case of *German Savings Bank v. Franklin County* (128 U. S. 526, 9 Sup. Ct. Rep. 159, 32 L. Ed. 519), or in the case of *Town of Eagle v. Kohn* (84 Ill. 292), and that is found in the fact that in the year 1885, in pursuance of the Illi-

nois funding bond act, approved February 13, 1865, as amended by acts approved April 27, 1877, and June 4, 1879 (Laws of Illinois, 1879, p. 229), and in pursuance of a vote of a majority of the legal voters of Saline county as prescribed by said statutes, new bonds were issued and registered in manner as directed in the law, and were delivered to the holders of the original bonds, which latter were surrendered and cancelled. The county of Saline thereafter, until the year 1890, paid the annual interest on such new issue of bonds. While it is true that the mere exchange of new bonds for old ones and the payment of interest on the former by the county authorities would not estop the county from challenging the validity of the new as well as that of the old bonds, yet we think it was competent for the county, in such a state of facts as here existed, by a vote of its people, to waive the condition attached to the original subscription and to estop itself from declining to be bound by the new negotiable securities."

"It may be fairly said that, while a municipal corporation may not ratify a contract into which it had no power to enter, and may not waive a condition put by the legislature upon the exercise of a given power, yet it may well waive a condition made by itself and not a condition upon the exercise of the power. Such a waiver is not an attempt to ratify a void contract, but is rather an admission that the condition has been complied with in an equitable sense." *Graves v. Saline County*, 161 U. S. 359, 16 Sup. Ct. Rep. 526, 40 L. Ed. 732.

579. (*Ky. 1896.*) Ratification can be effective only when the party ratifying possesses the power to perform the act ratified. *Mercer County v. Provident Life & Trust Co.*, Philadelphia, 72 Fed. 623, 19 C. C. A. 44.

Payment of interest.

580. (*Miss. 1895.*) Bonds irregularly issued under existing authority may be ratified by the municipality issuing them by payment of interest, so as to cure illegality. *Mayor, etc., of Columbus v. Dennison et al.*, 16 C. C. A. 125, 69 Fed. 58.

Appeal dismissed. (1898), 28 C. C. A. 680, 84 Fed. 1015.

Retention of proceeds of bonds; payment of interest.

581. (Colo. 1897.) Lake county received and retained full consideration for the bonds in suit. The bonds immediately passed into the hands of bona fide holders for full value. County paid interest on them for several years. Held, that any irregularities in the issuance of the bonds were thereby cured. *Dudley v. Board of Comrs. of Lake County, Colo.*, 28 C. C. A. 82, 80 Fed. 672.

Absence of power, no ratification.

582. (Kan. 1901.) Bonds which were issued without legal authority cannot be validated by any subsequent act of ratification by the body which issued them. *Sage v. Fargo Township*, 107 Fed. 383, 46 C. C. A. 361.

Ratification of irregularities in issuance, by acquiescence, retention of proceeds, payment of interest, etc.

583. (Neb. 1902.) "The irregularities complained of are not of such a nature as entitle the municipality to refuse to pay the bonds at this late day, even if it could ever have defended successfully on that ground. The irregularity complained of does not touch the power of the municipality to issue such bonds. It unquestionably had the necessary power, and more than two-thirds of the people of the precinct, at an election duly held, voted in favor of the issuance; and while it is true that the proposition, which was submitted to the voters, stated in general terms that the bonds were to be donated 'to S. L. Wiley * * * to aid in the construction of an irrigating and water power canal,' yet it was doubtless supposed by all persons concerned that these bonds were in fact so donated, and that they were acting in substantial compliance with the terms of the proposition, when the bonds were sold by the county and the proceeds were paid to a corporation which Wiley had organized for the express purpose of constructing the irrigating canal which he had proposed to construct. It is generally known that works of that nature are undertaken by corporations rather than individuals, and in the present instance it was most likely understood, when Wiley entered into negotiations with the precinct, that he had already organized, or would organize, a corporation to undertake the work. At all events, if there was a

departure from the terms of the proposition, which was regarded by the people of the precinct as at all material or detrimental to their interests, they should have taken the proper steps, in due season, to arrest the issuance and sale of the bonds and to compel a delivery thereof to Wiley in person, if they so desired. It would be manifestly inequitable to permit the municipality to take advantage of the irregularity complained of at this late day, after the bonds have been certified by the secretary of state and the auditor of public accounts as lawfully issued, and after the bonds have been sold and the proceeds paid to the municipality, and after it has levied taxes to pay the interest thereon for ten years or more (thereby giving them currency in the market), without complaint from anyone." *Kieth County v. Citizens Savings & Loan Assn.*, 53 C. C. A. 525, 116 Fed. 13.

No ratification of bonds by payment of interest when issued by officers having no authority to issue them.

584. (N. Y. 1903.) "We agree with the opinion of the court below that the bonds in suit are void because created without any authority by the officers who issued them to represent the town of Northampton, and that the long-continued payment of interest upon the bonds by the town did not validate them by ratification or estoppel."

"It follows inexorably that the adjudication of the county judge was void, that the officers appointed by him to carry the adjudication into effect never became the agents of the town for that purpose, and that the statutory authority by which alone the town was empowered to lend its credit was never brought into existence. If the bonds had been issued irregularly by the agents of the defendant, within the doctrine declared in many adjudications, the payment of interest upon them for a series of years would amount to a ratification by the defendant, notwithstanding the interest was raised by taxation. But this doctrine is not applicable in cases where there is a total want of authority on the part of the town to issue obligations. *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Cowdrey v. Town of Caneadea* (C. C.), 16 Fed. 532." *Clarke v. Town of Northampton*, 57 C. C. A. 123, 120 Fed. 661.

B. Ratification by Legislative Enactment; Curative Legislation; Constitutionality of Such Legislation.

Legislative ratification of unauthorized subscription.

585. (Ind. 1860.) "Mistakes and irregularities in the proceedings of municipal corporations are of frequent occurrence, and the State legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract, or injuriously affect the rights of third persons, are generally regarded as unobjectionable, and certainly are within the competency of the legislative authority. Unlike what is sometimes exhibited in laws of this description, the legislature did not attempt to ratify the subscription, but left the matter entirely optional with the common council, as the representatives of the city, to accept or reject the proffered remedy. They elected to ratify and affirm the subscription; and by so doing, gave the same effect to the contract to subscribe for the stock, and to all the proceedings that led to it, as if the authority to make it had been coeval with the presentation of the petition on which those proceedings were founded." *Bissell v. City of Jeffersonville*, 24 How. 287, 16 L. Ed. 664.

Ratifying legislatoin not necessarily express.

586. (Wis. 1866.) "This is not in terms a curative act, but it has that effect by fair implication. It is not doubted the legislature could, by a direct act of confirmation, legalize the issue of this scrip, notwithstanding the submission of the question to the vote of the people was under the wrong law. If by a direct act, equally in any other way, if the intention of the legislature to legalize clearly appears. It is conceded the legislature had the right to authorize the city of Kenosha to take stock in a railroad, issue bonds to pay for it, and provide for their redemption by the levy and collection of a tax. It did authorize these things to be done, if the people approved them; but as their sanction was obtained in the wrong way, thereby involving the legality of their proceedings, good faith and sound policy required, at the hands of the legislature, a full legislative recognition of the legality of the subscription and the issue of the scrip. This was done by the provisions of the revised charter of 1857." *Camp-*

bell v. City of Kenosha, 5 Wall. 194, 18 L. Ed. 610.

Ratification equivalent to authority.

587. (Wis. 1868.) "Whenever it has been presented, the ruling has been that, in cases of bonds issued by municipal corporations, under a statute upon the subject, ratification by the legislature is in all respects equivalent to original authority, and cures all defects of power, if such defects existed, and all irregularities in its execution." *Beloit v. Morgan*, 7 Wall. 610, 19 L. Ed. 203, 205.

588. (Wis. 1869.) Held in this case that legislative ratification is equivalent to original authority. *The City (of Kenosha) v. Lamson*, 9 Wall. 477, 19 L. Ed. 725-730.

Ratification of defective subscription.

589. (Ill. 1872.) "Argument to show that defective subscription of the kind may in all cases be ratified where the legislature could have originally conferred the power is certainly unnecessary, as the question is authoritatively settled by the decisions of the Supreme Court of the State, and of this court, in repeated instances."

"Such laws, when they do not impair any contract or injuriously affect the rights of third persons, are never regarded as objectionable, and certainly are within the competency of the legislative authority." *St. Joseph v. Rogers*, 16 Wall. 644, 21 L. Ed. 328.

Not submitting question to vote.

590. (Mo. 1874.) A number of counties in Missouri had made extensive road improvements and issued bonds in payment of same without submitting the question to the voters of the several counties, as required by law, according to the interpretation of the Supreme Court of the State. The legislature passed a curative act. Held, that the illegality was thereby remedied.

"In many cases retroactive laws, although intended to effect a good purpose, have features of injustice about them. This is not that case. The bonds here were issued under a supposed authority and no one interposed an objection. The taxpayers rested until the mischief was done and then tried to get relief. It is

certainly not unjust to them that the legislature should say, 'you must pay for an expenditure which you saw incurred and could have prevented, but did not.' If the County Court had acted wholly outside of its duties the aspect of the case might have been different." *Ritchie v. Franklin County*, 22 Wall. 67, 22 L. Ed. 825.

Mere reference to invalid act in subsequent act does not validate.

501. (Ill. 1876.) A mere reference to an invalid act by the legislature in a subsequent act does not give such invalid act validity when it is not shown that the subsequent act was intended to have such effect.

"To give to such a reference in a subsequent act, as is here relied on, the effect of validating or reviving or vitalizing a void or repealed statute, when no such intention is expressed, would be dangerous and would lay the foundation for evil practices. The legislature might in this way be entrapped into the enactment or reenactment of laws when it had no intention, or even suspicion, that it was doing so." *Town of South Ottawa v. Perkins; Supervisors of Kendall County v. Post*, 94 U. S. 260, 24 L. Ed. 154.

Legislature may require a city to pay an equitable claim on which, for technical defects, it is not liable.

502. (La. 1877.) "Assuming, then, that the bonds were invalid for the omission stated, they still represented an equitable claim against the city. They were issued for work done in its interest, of a nature which the city required for the convenience of its citizens, and which its charter authorized. It was, therefore, competent for the legislature to interfere and impose the payment of the claim upon the city. The books are full of cases where claims, just in themselves, but which, from some irregularity or omission in the proceedings by which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured. The power of the legislature to require the payment of a claim for which an equivalent has been received, and from the payment of which the city can only escape on technical grounds, would seem to be clear. Instances will readily occur to

every one, where great wrong and injustice would be done if provision could not be made for claims of this character. For example, services of the highest importance and benefit to a city may be rendered in defending it, perhaps, against illegal and extortionate demands; or moneys may be advanced in unexpected emergencies to meet, possibly, the interest on its securities when its means have been suddenly cut off, without the previous legislative or municipal sanction required to give the parties rendering the services or advancing the moneys a legal claim against the city. There would be a great defect in the power of the legislature if it could not in such cases require payment for the services, or a reimbursement of the moneys, and the raising of the necessary means by taxation for that purpose. A very different question would be presented, if the attempt were made to apply to the means raised to the payment of claims for which no consideration had been received by the city." *New Orleans v. Clark*, 95 U. S. 664, 24 L. Ed. 521.

Legislative confirmation equivalent to original authority.

503. (D. C. 1878.) In an action to enjoin collection of local assessments upon property in Washington, D. C., for street improvements, it was urged that the improvements and assessments were made without legal authority. The court says:

"We do not propose to inquire whether the charges of the bill are well founded. Such an inquiry can have no bearing upon the case as it now stands; for were it conceded that the board of public works had no authority to do the work that was done at the time when it was done, and, consequently, no authority to make an assessment of a part of its cost upon the complainants' property, or to assess in the manner in which the assessment was made, the concession would not dispose of the case, or establish that the complainants have a right to the equitable relief for which they pray. There has been congressional legislation since 1872, the effect of which upon the assessments is controlling. There were also acts of the legislative assembly of the District, which very forcibly imply a confirmation of the acts and assessments of the board of which the bill complain. If Congress or the

legislative assembly had the power to commit to the board the duty of making the improvements and to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized. And the ratification, if made, was equivalent to an original authority."

The legislation in this case reviewed and held to amount to a confirmation. *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098.

Bonds of a county in territory of Dakota validated by act of congress.

594. (Dak. 1879.) It was held in this case that whether an act of the territorial legislature authorizing the issuance of bonds by counties to aid in the construction of a railroad, was valid or not, the act of Congress considered in the decision had the effect to validate the bonds involved in the suit. *National Bank v. County of Yankton*, 101 U. S. 129, 25 L. Ed. 1046.

Curative statute held not unconstitutional.

595. (N. Y. 1880.) Held, that the legislature of a State may by curative statute legalize bonds issued without complying with the requirements of law, if the legislature had power at the time of issuing to authorize their issuance without such conditions.

Irregularities cured.

The town of Thompson issued its bonds to aid a railroad company, and instead of selling them as the law required, exchanged them with the railroad company for its stock. Other irregularities were committed. Held, that a curative act of the legislature had the effect to cure such irregularities and to validate the bonds.

"If it be conceded that the consents were insufficient; that a seal was necessary as evidence of the official authority of the commissioners; that the recitals on the bonds, reasonably construed, gave notice to purchaser that they had been illegally exchanged for stock, when they should have been disposed of or sold, at not less than their par value, and their proceeds invested in the stock of the company—the town is, nevertheless, liable, if the curative act of April 28,

1871, was within the constitutional power of the legislature to pass." *Thompson v. Perrine* 103 U. S. 806, 26 L. Ed. 612; *Thompson v. Perrine*, 106 U. S. 589, 1 Sup. Ct. Rep. 564, 568, 27 L. Ed. 278.

Ratification of unauthorized subscription and vote therefor.

596. (Ill. 1882.) The authorities of the city of Quincy in August, 1868, in pursuance of a vote of the electors of the city subscribed to the capital stock of a railroad company, and by ordinances directed the issuing of \$100,000 of bonds of the city in payment of the stock so subscribed, for all of which there was no legal authority. "The general assembly of Illinois passed March 27, 1869, a statute declaring 'that the acts of the city council of the city of Quincy, from June 2, 1868, to August 28, 1868, in ordering an election on the proposition to subscribe \$100,000 to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, and the subscription of said stock, and all other acts of said council in connection therewith, are hereby legalized and confirmed.'" Thereafter the bonds were issued. Held, that by force of the act of March 27, 1869, the bonds were valid. *Quincy v. Cook*, 107 U. S. 549, 2 Sup. Ct. Rep. 604, 27 L. Ed. 549.

Validating bonds issued in excess of legal authority.

597. (Neb. 1882.) Bonds were issued by the city of Plattsmouth in excess of the amount authorized by law. Held to have been validated by subsequent act of the legislature. *Read v. Plattsmouth*, 107 U. S. 568, 2 Sup. Ct. Rep. 208, 27 L. Ed. 414.

Validating an unauthorized election.

598. (Ill. 1884.) An election was called and held on the question of issuing bonds of a city to aid in the construction of a railroad, resulting in favor of the proposition. The election was held without legal authority therefor. Held, that it was competent for the legislature to validate the election by a subsequent enactment and the bonds thereafter issued in pursuance of such election were valid, there being no provision of the Constitution of the State prohibiting such legislation. *Jonesboro City v. Cairo*

& St. Louis Railroad Co., 110 U. S. 192, 4 Sup. Ct. Rep. 67, 28 L. Ed. 116.

Election not legally held cured by subsequent act of legislature.

599. (Neb. 1884.) "As the legislature had power to authorize the issue of bonds without any precedent action of the voters of the county, it could validate the issue of bonds by curing and legalizing defects in respect to the voting. The bonds were assigned by the railroad company, and came to the plaintiff after the acts of 1869 were passed, and he became a bona fide holder of them on the faith of those acts. The doctrine is well settled in this court, that the legislature of a State, unless restrained by its organic law, has the right to authorize a municipal corporation to issue bonds in aid of a railroad, and to levy a tax to pay the bonds and the interest on them, with or without a popular vote, and to cure by a retrospective act, irregularities in the exercise of the power conferred." *Otoe County v. Baldwin*; *Baldwin v. Otoe County*, 111 U. S. 1, 4 Sup. Ct. Rep. 265, 28 L. Ed. 231.

Ratifying acts must not be uncertain.

600. (Miss. 1885.) In this case it was held that the act relied upon to confirm and ratify the subscription and bonds was too vague and uncertain in its application to form the basis of such confirmation. *Hayes v. Holly Springs*, 114 U. S. 120, 5 Sup. Ct. Rep. 785, 29 L. Ed. 81.

Ratification of unauthorized issue of bonds.

601. (Miss. 1884.) A subscription by a county to the stock of a railroad company and the issuance of bonds therefor without authority previously conferred may be ratified by subsequent enactment if the legislature had power under the Constitution to authorize the subscription and the issuance of the bonds. *Grenada County Supervisors v. Brodgen*, 112 U. S. 261, 5 Sup. Ct. Rep. 125, 28 L. Ed. 704; *Anderson v. Santa Anna*, 116 U. S. 356, 6 Sup. Ct. Rep. 413, 29 L. Ed. 633; *Bolles v. Brimfield*, 120 U. S. 759, 7 Sup. Ct. Rep. 736.

Constitutionality of ratifying statutes.

602. (Ill. 1886.) A discussion will be found in this case on the question

of the constitutionality of statutes intended to give effect to the corporate action taken without previous legal authority. A number of authorities cited. *Anderson v. Santa Anna*, 116 U. S. 356, 6 Sup. Ct. Rep. 413, 29 L. Ed. 633.

On the same subject, see *Bolles v. Brimfield*, 120 U. S. 759, 7 Sup. Ct. Rep. 736.

Application of curative act; railroad aid.

603. (Ill. 1887.) "An act to legalize certain aids heretofore voted and granted to aid in the construction of the Chicago, Danville & Vincennes Railroad," has reference only to aids voted and granted prior to its passage and has no reference to such aids subsequently granted. *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. Rep. 937, 30 L. Ed. 885.

The legislature cannot ratify the unauthorized issuance of bonds, unless it has power to confer authority for their issuance.

604. (Miss. 1886.) "The bonds in the present case, when issued, were unauthorized and void, so that the only question is whether the curative statute has made them good. The objection to them is not that they were issued irregularly, but that there was no power to issue them at all. They are to be made good, if at all, not by waiving irregularities in the execution of an old power, but by the creation of a new one. Clearly, therefore, if the legislature had no constitutional authority to grant the new power, a statute passed for that purpose could not have the effect of validating the old bonds. In *Grenada County Supervisors v. Brodgen* the validating act was sustained, because the subscription was voted by the required two-thirds majority of voters, and, therefore, the Constitution of 1869 did not stand in the way of what was done. Here, however, there has been no vote at all." *Katzenberger v. Aberdeen*, 121 U. S. 172, 7 Sup. Ct. Rep. 947, 30 L. Ed. 911.

If legislature has power to authorize bonds it may ratify those illegally issued.

605. (Iowa, 1866.) As the legislature of Iowa had the power to authorize the city of Keokuk to subscribe for and take stock in a railroad company, and to issue its bonds

in payment therefor, and to levy a tax to pay the interest upon such bonds, "its act legalizing the issue of county, city, and town corporation bonds in the counties of Lee and Davis," gave validity to said bonds notwithstanding any informality or illegality in their issuing. *Rogers v. Keokuk*, 154 U. S. 546, 14 Sup. Ct. Rep. 1162, 18 L. Ed. 74.

Ratification of territorial bonds by act of Congress.

606. (Ariz. 1890.) Railroad-aid bonds had been issued by the county of Pima, Arizona, without legal authority. Held, that an act of Congress passed for that purpose had the effect to validate them.

"We think it was within the power of Congress to validate these bonds. Their only defect was that they had been issued in excess of the powers conferred upon the territorial municipalities by the act of June 8, 1878. There was nothing at that time to have prevented Congress from authorizing such municipalities to issue bonds in aid of railways, and that which Congress could have originally authorized it might subsequently confirm and ratify. This court has repeatedly held that Congress has full legislative power over the Territories, as full as that which a State legislature has over its municipal corporations." *Utter v. Franklin*, 172 U. S. 416, 19 Sup. Ct. Rep. 183, 43 L. Ed. 498.

607. (Ill. 1892.) A curative act of the legislature of Illinois held invalid, as imposing an obligation upon a municipal corporation without its consent. *Post v. Pulaski County*, 1 C. C. A. 405, 49 Fed. 628, 9 U. S. App. 1.

Invalid ordinances; ratification by legislative enactment; noncompliance with provisions of ratified ordinances; bonds held void.

608. (Cal. 1897.) Ordinances having been passed by the board of trustees of the city of San Diego, California, in 1872 and 1873 intended to authorize the issuance of bonds by said city, for the issuance of which there was no legal authority, the legislature passed an act which was ap-

proved February 24, 1874, providing that said ordinances are "hereby legalized, ratified, confirmed, and declared valid to all intents and purposes;" "and all bonds already issued, or that may hereafter be issued, under and in accordance with the provisions of said ordinance number twenty-two, are hereby declared to be legal and valid obligations of and against said city," etc.

In the issuance of the bonds the terms and conditions prescribed in said ordinance were not complied with and the bonds were held void for want of authority in the officers issuing them.

The said act "did not attempt in any manner to change the terms and conditions as to the issuance of the bonds. The ordinances, as thus ratified, constituted the mode and the measure of the power of the board of trustees, and could not be departed from." The case of *McCoy v. Briant*, 53 Cal. 247, followed. *Lehman v. City of San Diego*, 27 C. C. A. 668, 83 Fed. 669.

Legislative ratification.

609. (Miss. 1895.) An act passed after a city had issued its bonds, authorizing the city to levy and collect a special tax to pay the interest thereon and provide a sinking fund for payment of the principal, was held to be a ratification of such bonds curing the illegality alleged. *Mayor, etc., of Columbus v. Dennison, et al.*, 16 C. C. A. 125, 69 Fed. 58.

Appeal dismissed. (1898), 28 C. C. A. 680, 84 Fed. 1015.

Retroactive statutes not unconstitutional when in furtherance of justice by fulfillment of moral obligation.

610. (Ohio. 1901.) By the legislation involved in this case, it was intended to validate an indebtedness evidenced by county bonds issued by authority of an act of the legislature of Ohio, which was held, after the issuance of the bonds, to be unconstitutional. For a full digest of the case, see chapter 11, Part B. *New York Life Ins. Co. v. Board of Comrs. of Cuyahoga County, Ohio*, 106 Fed. 123.

CHAPTER IX.

TAXATION; TAXES; ASSESSMENTS; THE BONDHOLDERS' SECURITY.

- A. Power to tax; nature and source of the power; legislative control.
- B. Power to tax, implied from grant of power to incur indebtedness.
- C. Fund applicable to payment of bonds.

Municipal bonds and the interest on them are paid by the levy and collection of taxes or assessments upon personal or real property, or both, and sometimes in part by a license or poll-tax.

Though the faith and credit of the municipality whose official authorities issue the bonds are generally pledged for their payment, to be made by a general tax upon the taxable property of the entire municipal body, in some instances provision for payment is made by a tax to be levied upon the taxable property of a special or limited district, or by special assessments upon real estate within limited areas; and when provision is made for such special tax or assessment, it is important to ascertain whether the municipality is bound for the payment of the bonds beyond the proceeds of such special tax or assessment. Among this latter class are bonds issued by county boards or courts in some States on behalf of townships, precincts, and road and drainage districts within the county, or by city or village authorities for street and sewer improvements. Whether the liability of the corporate body whose authorities execute such bonds extends beyond the particular special tax or assessment, must be determined in each case from the provisions of all laws relating to the subject.

The power of taxation, in some form, for the payment of public securities and the extent of such power are no less important to the holder than the power or authority to issue the obligations. One holding municipal bonds whose issuance is authorized by law, but for the payment of which there is no valid authority to levy and collect taxes, or assessments, may be in a position similar to a holder of notes of an insolvent person or private

corporation, entitled to a judgment against his debtor, but unable to find property on which to levy his execution.

Authority to tax is generally conferred coextensive with the authority to incur indebtedness, but not always. This may result from constitutional or statutory limitations upon the power to tax, or, from the invalidity, for some reason, of the statute relied upon as authority for the levy of the necessary taxes or assessments.

There have been instances in which, at the time bonds were issued, the rate of annual tax authorized to be levied upon the taxable property as then assessed for taxation would be sufficient to pay the debt, but owing to decreasing valuation of taxable property from year to year, or in a number of years, the amount of taxes authorized has not been sufficient in subsequent years. Such a condition may be remedied by the legislature, where there are no constitutional provisions prohibiting an increased rate of taxation, but not in violation of such constitutional inhibition.

It has been held to be a general rule that express authority to create an indebtedness for a public purpose implies authority to levy and collect the necessary tax to pay the debt; but that rule is subject to the exception that, when it reasonably appears that the intention of the legislature was to place a limitation upon the amount of taxes to be levied for all purposes, or for any particular purpose, such limitation cannot be exceeded, and the courts cannot compel, and, when appealed to, will not permit, taxation beyond the prescribed limit.

The power and control of taxation are vested in the legislature, and that power and control are restricted only by the express or implied limitations of the State and Federal Constitutions.

Such constitutional provisions should not be overlooked. Authority to tax can be neither expressly conferred nor implied in violation of any such constitutional provisions.

It is not intended in this connection to cite or refer to all the cases on the subject of taxation, but a number will be included besides those in which municipal bonds have been directly involved. The subjects of taxation and assessment are so extensive and the constitutional and statutory provisions relating thereto are so varied and numerous, that a comprehensive discussion of principles, or citation of the authorities generally on those subjects would be entirely beyond the scope or purpose of this unpretentious work.

So many questions have arisen, in proceedings to compel the levy and collection of taxes for the payment of judgments rendered upon municipal obligations, relating to the power to tax and limitations upon, and conditions affecting, the power, that the two subjects seem to be inseparable, and it has been thought to be expedient to place a full digest of most of the cases involving such proceedings and the power to tax in chapter XII, relating to remedies of bondholders. The greater number of such cases will be found in part C of that chapter. Most of the cases relating to special assessments will be found in chapter XI, as they have generally involved constitutional questions.

A. Power to Tax; Nature and Source of the Power; Legislative Control.

Legislative control of taxation.

611. (Mich. 1873.) "The legislative power of a State extends to everything within the sphere of such power, except as it is restricted by the Federal Constitution or that of the State." *Pine Grove Township v. Talcott*, 19 Wall. 666, 22 L. Ed. 227.

Power of state legislature to tax restrained only by constitution.

612. (La. 1877.) "The power of taxation which the legislature of a State possesses may be exercised to any extent upon property within its jurisdiction, except as specially restrained by its own or the Federal Constitution; and its power of appropriation of the moneys raised is equally unlimited. It may appropriate them for any purpose which it may regard as calculated to promote the public good. Of the expediency of the taxation or the wisdom of the appropriation it is the sole judge. The power which it may thus exercise over the revenues of the State it may exercise over the revenues of a city, for any purpose connected with its present or past condition, except as such revenues, may, by the law creating them, be devoted to special uses; and, in imposing a tax, it may prescribe the municipal purpose to which the moneys raised shall be applied." *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521.

Tax limit imposed by legislature, controlling.

613. (Mo. 1878.) "If there had been nothing in the act to the con-

trary, it might, perhaps, have been fairly inferred that it was the intention of the legislature to grant full power to tax for the payment of the extraordinary debt authorized to an amount sufficient to meet both principal and interest at maturity. This implication is, however, repelled by the special provision for the tax of one-twentieth of one per cent. and the case is thus brought directly within the maxim, *expressio unius est exclusio alterius*."

"Thus, while the debt was authorized, the power of taxation for its payment was limited, by the act itself and the general statutes in force at the time, to the special tax designated in the act, and such other taxes applicable to the subject as then were or might thereafter by general or special acts be permitted."

If municipality has no power to raise money by tax.

"If the statute gives no power to make the bond, the municipality is not bound. So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose. If the purchaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulties in the way of payment. As it is, he holds the obligation of a debtor who is unable to provide the means of payment. We have no power by mandamus to compel a

municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation. In this case it appears that the special tax of one-twentieth of one per cent. has been regularly levied, collected, and applied, and no complaint is made as to the levy of the one-half of one per cent. for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws we have no power to order."

General law not applicable.

"Our attention has been directed to the general railroad law in force when the Missouri and Mississippi Railroad Company was incorporated and when the bonds in question were issued, and it is insisted that ample power is to be found there for the levy of the required tax. The power of taxation there granted is, as we think, clearly confined to subscriptions authorized by that act, which require the assent of two-thirds of the qualified voters of the county. Under such circumstances, it seems to have been considered proper to allow substantially unlimited power of taxation to pay a debt which the voters had directly authorized. In this case no such assent was required and the taxpayers were protected against the improvident action of the official authorities by a limit upon the amount they should be required to pay in any one year. The general railroad act was in force when this company was incorporated, but its provisions seem not to have been satisfactory to the corporators. They wanted authority for counties to subscribe without an election, and on that account accepted the terms which were offered. As the bondholders claim under the corporation, they must submit to the conditions as to taxation which were substituted for those that would otherwise have existed."

Judgment gives creditor no additional right of taxation.

"We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand and of the amount that

is due, but it gives him no new rights in respect to the means of payment." *United States v. County of Macon*, 99 U. S. 582, 25 L. Ed. 331.

Taxation, when not unconstitutional.

614. (Ala. 1880.) The issue by the president and commissioners of revenue of Mobile county, of bonds for the improvement of the river, bay, and harbor of Mobile, under the act of February 16, 1876, of the legislature of Alabama was not a taking of private property for public use within the meaning of the constitutional clause.

"It was a loan of the credit of the county for a work public in its character, designed to be of general benefit to the State, but more especially and immediately to the county. The expenses of the work were of course to be ultimately defrayed by taxation upon the property and people of the county. But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution. Taxation only exacts a contribution from individuals of the State or of a particular district, for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure. But when private property is taken for public use, the owner receives full compensation. The taking differs from a sale by him only in that the transfer of title may be compelled, and the amount of compensation be determined by a jury or officers of the government appointed for that purpose. In the one case, the party bears only a share of the public burdens; in the other, he exchanges his property for its equivalent in money. The two things are essentially different."

Taxation is in legislative discretion.

"Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may ap-

portion the burden ratably among all the counties, or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State especially and immediately benefited by the expenditure."

Taxation not unconstitutional because oppressive.

"It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement, which was to benefit the whole State, among all its counties. But this court is not the harbor, in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive State legislation. The judicial power of the Federal government can only be invoked when some right under the Constitution, laws, or treaties, of the United States is invaded. In all other cases, the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests." *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238.

Taxation permitted for corporate purposes only.

615. (Ill. 1880.) "Taxation by municipal or public corporations must be for a corporate purpose. It is not always easy to decide whether a certain kind of tax is within or without this limitation; but we think it may be safely said that, as a general rule, a corporate purpose must be some purpose which is germane to the general scope of the object for which the corporation was created."

Taxation by school districts for school purposes only.

"Taxation for school purposes only would be germane to such corporations, and no one would or could reasonably suppose that they were created for managing the general affairs of a political subdivision of the State. As was very properly said in *People v.*

Trustees of Schools, supra, 'their creation is purely to aid in the great scheme of accomplishing universal education.' They are pre-eminently public-school corporations, and in the absence of legislative power under the Constitution can no more tax the people to build railroads than an ordinary school district or an incorporated academy can use its funds in that way. A railroad may help the people in a school district, but it can hardly be said that the construction of a railroad is a school purpose. The existence of railroads may and undoubtedly will make schools more necessary, and school property more valuable; but the construction of railroads is not necessary either to the establishment or maintenance of schools. Railroads are the effect rather than the cause of schools." *Weightman v. Clark*, 103 U. S. 256, 26 L. Ed. 392.

Slaves being taxable property, abolition of slavery did not affect creditors' rights.

616. (La. 1881.) Statutes of Louisiana authorizing the issuance of bonds by the consolidated city of New Orleans provided for a tax to pay the obligation to be levied upon real estate and slaves, to the exclusion of all other personal property. Slavery was thereafter abolished. Held, that the creditors' rights were not thereby affected. "Nor is their right in that respect affected by the fact that since 1852 slavery has been abolished, and that there are no longer slaves upon whom taxation can be levied. The obligation of the city to raise the required fund by special tax on real estate still remains. That is no more lessened than it would be by the destruction of any other portion of the taxable property; although the rate of taxation on what is left might be thereby increased."

Uniformity and equality of taxation.

A law providing for a tax to be levied upon real estate and slaves, to the exclusion of personal property, does not violate that provision of the Louisiana Constitution as follows: "Taxation shall be equal and uniform throughout the State. After the year 1848, all property on which taxes may be levied in this State shall be taxed in proportion to its value, to be ascertained as directed by law. No one

species of property shall be taxed higher than any other species of property of equal value on which taxes shall be levied; the legislature shall have the power to levy an income tax, and to tax all persons pursuing any occupation, trade or profession." Nor is that provision of the Constitution violated by a statutory requirement that the taxes to pay the debts of the constituent bodies assumed by a consolidated city shall be levied on the properties of the different original bodies in proportion to the indebtedness of each. *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090.

Constitutional tax limit; shown to be not exceeded in this case; railroad stock owned by county subject to payment of indebtedness.

617. (Ill. 1881.) The Constitution of Illinois declared that: "County authorities shall never assess taxes, the aggregates of which shall exceed seventy-five cents per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this Constitution, unless authorized by a vote of the people of the county." Railroad-aid bonds were issued by the county board of Moultrie county to the Bloomington & Ohio River Railroad Company without a vote of the electors, under an act conferring such authority.

In an action on coupons of such bonds, it appeared "That to enable said county to pay the indebtedness created by said donations to said Bloomington and Ohio River Railroad Company and to said Decatur, Sullivan and Mattoon Railroad Company, evidenced by said bonds still outstanding, the interest coupons upon which were sued on and offered in evidence in this case, will require the annual assessment of taxes, which will exceed 75 cts. per \$100 valuation of the taxable property of said county of Moultrie," for which reason it was urged that the bonds were void. Held, that the bonds were not void for that reason.

"The authority cited to sustain this position merely decides that the bonds are void where there is no power in the legislature to authorize a tax in aid of the purpose for which they were issued. But here it is conceded that there is power, within certain limits, to levy a tax to pay these bonds.

They cannot, therefore, be void. *Marcy v. Township of Oswego* (92 U. S. 637, 23 L. Ed. 748).

"Moreover, it appears from the findings of the court that at the time the bonds in question were issued a levy of seventy-five cents on every hundred dollars valuation of the taxable property of the county would produce a sum sufficient to pay the ordinary expenses of the county, and leave a surplus over \$7,000 to be applied to the payment of the bonds, and that at the commencement of this suit, such annual surplus, by reason of the increase in the taxable property of the county, would amount to nearly \$15,000—a sum almost sufficient to pay the judgment rendered in this case. So that the defense now under consideration is reduced to this, that because the whole judgment cannot be at once collected, there should be no judgment at all.

"But it nowhere appears in the record that the county has not ample means out of which the judgment could be collected besides its revenues derived from taxation. We know from the record that the county at one time owned \$80,000 of the stock of the Decatur, Sullivan & Mattoon Railroad Company, and it does not appear that it is not still the owner of this stock, and that it may not now be subjected to the payment of the judgment recovered in this case, or that the county may not have other similar assets sufficient to pay all its debts." *County of Moultrie v. Fairfield*, 105 U. S. 370, 26 L. Ed. 945.

Constitutional tax limit affecting power to issue bonds.

618. (Tex. 1894.) The Constitution of Texas placed a limitation upon the rate of taxation by municipal corporations for making improvements. Bonds were issued by the city of Terrell to raise money to erect a city hall, when the city's debt theretofore created required for its payment the full amount of tax that was permitted by the Constitution. Held, that the city hall bonds were void for want of power to issue them. *Millsaps v. City of Terrell*, 8 C. C. A. 554, 60 Fed. 193.

619. (Tex. 1894.) "The Constitution being silent, the legislature had power to provide, in its discretion,

for the taxing of property in the State, and for the distribution and appropriation of the taxes to be raised." *Marion County v. Coler*, 14 C. C. A. 301, 67 Fed. 60.

Purchasers of bonds bound to know taxing power.

620. (Colo. 1896.) "Persons who become purchasers of the securities of a municipal corporation, whether they are bonds or warrants, must take notice of any limitations that have been imposed upon the power of taxation for their payment, and of the provisions that have been made by law to that end. Where some provision has been made to enable a municipal corporation to discharge its debts, the fact that the provision so made is inadequate will not authorize a court to devise a different plan, or to compel a larger exercise of the power of taxation. *United States v. Macon County*, 90 U. S. 582, 590; *Supervisors v. United States*, 18 Wall. 71." *Stryker v. Board of Comrs. of Grand County, Colo.*, 23 C. C. A. 286, 77 Fed. 567.

Power of taxation an essential attribute.

621. (Fla. 1896.) "When such a corporation as the city of Key West is created, the power of taxation is vested in it as an essential attribute for all of the purposes of its existence, unless its exercise be in express terms prohibited. *United States v. New Orleans*, 98 U. S. 303; *Citizens' Sav. & Loan Assn. v. City of Topeka*, 20 Wall. 660." *United States, ex rel., Baer v. City of Key West*, 23 C. C. A. 663, 78 Fed. 88.

General law limiting tax levy, when will not control as to bonds issued under a special act.

622. (Minn. 1901.) In 1870 the town of Alden, Minnesota, issued railroad aid bonds by authority of a special act. The general law of that State then in force limited the levy of taxes "for the several purposes in this chapter enumerated" to ten mills on the dollar.

"It is contended by plaintiff in error that the provisions of General Statutes of 1866, c. 11, 78, are applicable to and control the present case, and that the limit of indebtedness there

fixed, namely, such as shall not exceed ten mills on the dollar of taxable property of the town, exhausted the power of the town. It is admitted that \$15,000, the aggregate of the bonds issued, exceed that limit. It is contended on the other hand by the defendant in error, that the provisions of the General Statutes already quoted are not applicable to the creation of the bonded indebtedness in question, but that the Special Acts of 1868 and 1869 conferred ample authority upon any town to incur an indebtedness in aid of the construction of railroads through the county, in any amount which might be agreed upon by a majority of the qualified voters of the town. The trial court adopted the latter view, and ruled accordingly. The correctness of this ruling only is brought to our attention by the assignment of errors." Held, that the limitation in the general law did not control.

"It thus appears that this act is complete in itself, and requires no resort to the general law for its enforcement. It authorizes the issuing of bonds, and provides a full scheme of taxation to secure funds for their payment." *Town of Alden v. Easton*, 51 C. C. A. 47, 113 Fed. 60.

Bonds issued by county commissioners; whether general county obligations, or payable solely from special assessments.

623. (Ohio. 1902.) Road improvement bonds were issued by the board of county commissioners of Franklin county, Ohio. The enabling act authorized the board, from time to time as the improvement progresses, to "issue the bonds for such improvement in such sums as will be required in all to an amount not exceeding the contract price of the work and the expenses attending the same and interest," and further provided that the bonds should be negotiated at not less than par "as other bonds of said county are negotiated."

The act further provided that the bonds should "bear the name of the street for whose improvement they were issued, and shall state therein that they are to be paid by an assessment upon the property abutting on the said improvement."

The act further provided, "If any bond or interest shall be due and no money is in hand to pay the same, the commissioners shall be authorized to make a temporary loan to pay the same; but such lien shall continue in full force on the abutting property for the full assessments not paid and accrued interest for such temporary loan in behalf of said county."

"We find no suggestion in the act that they are to be other than the bonds of the county. We are not now considering the power of assessment or taxation to pay the bonds, but solely the question of whose obligations are authorized in the law. To say the bonds must have an obligor is to state a self-evident truth. The county commissioners are not authorized to issue any other. The spirit and letter of this act indicate the intention to authorize the execution and negotiation of these bonds, "as other bonds of the county are negotiated." In determining whether the bonds are county obligations, the provisions of section 12 of the act are not to be lost sight of. By the terms of that section, if any bond or interest shall be due, and there is no money to pay the same, the commissioners are authorized to make a temporary loan to pay the same. The lien of the assessment for such temporary loan is to continue for the benefit of the county. Such provisions are generally held to be for the benefit of the holder of the obligation of the corporation which is thus empowered to raise money to meet a legal indebtedness. *Supervisors v. United States*, 4 Wall. 435, 18 L. Ed. 419; *City of Little Rock v. United States*,

43 C. C. A. 261, 103 Fed. 418; *Village of Kent v. United States*, 51 C. C. A. 189, 113 Fed. 232. While we are not now called upon to pass upon the question as to whether the commissioners can be compelled to exercise this authority in favor of bondholders, this feature of the law is entitled to weight, in view of the contention that it was the purpose of the act to impose no obligation upon the county beyond the collection and application of the assessments. It is the county that is here authorized to make loans to meet deficiencies in assessments in order that the bonds may be met at maturity. The commissioners represent the county, and no other political or corporate body. They are authorized to issue the bonds of that quasi-corporation whose officers they are."

Held, further, that an intention to restrict the liability of the county in issuing these bonds should be clearly expressed. *Board of Commissioners v. Gardiner Savings Inst.*, 55 C. C. A. 614, 119 Fed. 36.

Taxation of agencies of Federal government by authority of State law.

624. (Minn. 1914.) In this instance bonds of municipalities of the Territories of Oklahoma and Indian Territory. Held, such bonds could not be taxed under the laws of States. A full discussion of the subject citing earlier decisions. *Farmers Bank v. Minnesota*, 232 U. S. 516, 34 Sup. Ct. Rep. 354, — L. Ed. —.

625. (Okla. 1914.) See also, on same subject: *Choctaw, Oklahoma & Gulf Railroad Co. v. Harrison*, 233 U. S. 292, 35 Sup. Ct. Rep. 27, — L. Ed. —.

B. Power to Tax, Implied from Grant of Power to Incur Indebtedness.

Language in form permissive, held, to be peremptory.

626. (Ill. 1866.) An act declared that the board "may, if deemed advisable," levy a special tax to liquidate indebtedness. Held, that this language should be construed to be peremptory.

"The counsel for the respondent insists, with zeal and ability, that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors,

and that judicial action cannot control the discretion with which the statute has clothed them. We cannot concur in this view of the subject. Great stress is laid by the learned counsel upon the language, 'may, if deemed advisable,' which accompanies the grant of power, and, as he contends, qualifies it to the extent assumed in his argument."

"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the lan-

guage of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose ‘a positive and absolute duty.’

“The line which separates this class of cases from those which involve the exercise of a discretion, judicial in its nature, which courts cannot control, is too obvious to require remark. This class clearly does not fall within the latter category.” *Supervisors v. United States*, ex rel., 4 Wall. 435, 18 L. Ed. 419.

To the same point, see *City of Little Rock v. United States*, 103 Fed. 418, 43 C. C. A. 261.

Municipal indebtedness paid by taxation; power to incur debt implies power to tax.

627. (Kan. 1874.) “But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation. It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it. If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which the legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation depends on

the power to levy the tax for that purpose. It is, therefore, to be inferred that when the legislature of the State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.” *Loan Assn. v. Topeka*, 20 Wall. 655, 22 L. Ed. 455.

Authority to tax implied from authority to incur obligations.

628. (La. 1878.) “The position that the power of taxation belongs exclusively to the legislative branch of the government, no one will controvert. Under our system it is lodged nowhere else. But it is a power that may be delegated by the legislature to municipal corporations, which are merely instrumentalities of the State for the better administration of the government in matters of local concern. When such a corporation is created, the power of taxation is vested in it as an essential attribute for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of those purposes, its authorities, however limited the corporation, must have the power to raise money and control its expenditure. In a city, even of small extent, they have to provide for the preservation of peace, good order, and health, and the execution of such measures as conduce to the general good of its citizens; such as the opening and repairing of streets, the construction of sidewalks, sewers, and drains, the introduction of water, and the establishment of a fire and police department. In a city like New Orleans, situated on a navigable stream, or on a harbor of a lake or sea, their powers are usually enlarged, so as to embrace the building of wharves and docks or levees for the benefit of commerce, and they may extend also to the construction of roads leading to it, or the contributing of aid towards their construction. The number and variety of works which may be authorized, having a general regard to the welfare of the

city or of its people, are mere matters of legislative discretion. All of them require for their execution considerable expenditures of money. Their authorization without providing the means for such expenditures would be an idle and futile proceeding. Their authorization, therefore, implies and carries with it the power to adopt the ordinary means employed by such bodies to raise funds for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation. A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose.

"For the same reason, when authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom indeed, as to be exceptional—any means to discharge their pecuniary obligations except by taxation. 'It is therefore to be inferred,' as observed by this court in *Loan Association v. Topeka* (20 Wall. 660) 'that when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.'

"Indeed, it is always to be assumed, in the absence of clear restrictive provisions, that when the legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that the payment shall not be left to its caprice or pleasure. When, therefore, a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication cannot be overcome except by express words excluding it." *United States v. New Orleans*, 98 U.

S. 381, 25 L. Ed. 225, 227, 228. Reviewed and followed in the case of *Wolff v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395.

Authority to contract indebtedness implies authority to tax.

629. (Mo. 1881.) The act under authority of which the bonds in suit were issued provided that: "It shall be lawful for the County Court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company; and it may invest its funds in the stock of said company, and issue the bonds of said county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county. Such County Court may appoint an agent to represent the county, vote for it, and receive its dividends."

At the time said act was passed, there were in the laws of Missouri limitations on the power of the County Court to levy taxes to defray the expenses of the county, which confined such tax for a year to one-half of one per cent. or less. The question was whether that limit was applicable to the obligation created by the bonds. In a discussion of the question, the court say: "It must be considered as settled in this court, that when authority is granted by the legislative branch of the government to a municipality, or a subdivision of a State, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred, is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention." *Ralls County Court v. United States*, 105 U. S. 733, 26 L. Ed. 1220, 1223.

Power to tax inferred from power to create debt.

630. (Ky. 1894.) "The power to assess, levy, and collect a tax would be necessarily implied from the power to create the debt, there being nothing in the act indicating an expectation that payment should be made in any other way, and no constitutional

obstacle either in the character of the debt or to the granting of such power by the legislature, being suggested. *Citizens' Savings & Loan Assn. v. City of Topeka*, 20 Wall. 656; *Ralls County v. United States*, 105 U. S. 735; *Quincy v. Jackson*, 113 U. S. 335, 5 Sup. Ct. Rep. 544. The purpose that this debt shall be paid by taxation is made clear. That no general authority exists to levy an ad valorem tax for general county purposes is not important. The power to assess and levy a special ad valorem tax is by implication clearly conferred in section 14, to say nothing of the implication which results from the grant of power to create the debt and issue the bonds." *Breckinridge County v. McCracken, et al.*, 9 C. C. A. 442, 61 Fed. 191.

Power to tax not implied in all cases from power to incur debts.

631. (Colo. 1895.) "The power to raise money by taxation is the highest attribute of sovereignty. It is a power absolutely essential to the existence of civil government. When properly exercised, it is the protection and defense of the State and the security of the citizen; but history shows that it may be converted into the most powerful engine of injustice and oppression, and used to deprive the citizen of his property rather than protect him in its enjoyment. The people of this country have studiously confined the exercise of this delicate and vitally important power to their immediate representatives. Nor have they been willing to intrust their representatives with its unlimited exercise, but have imposed on them constitutional restrictions and limitations in its exercise. They have at all times refused to confer it in any measure or degree on the executive or judicial departments of the government. Under our system of government, therefore, the power to tax is a legislative function exclusively, and cannot be exercised except in pursuance of legislative authority. There is no connection between the power to contract debts and the power to levy taxes. The power to contract a debt does not imply the power to levy a tax to pay it." Board of Comrs. of

Grand County v. King, 14 C. C. A. 421, 67 Fed. 202.

Authority to tax may be implied, when; when not.

632. (Colo. 1896.) "It has been held in some cases that when, for the purpose of aiding in the execution of some public work, a municipal corporation has been empowered to borrow money and to issue bonds, a power will be implied to levy a tax for an amount adequate to discharge such obligations, although no such power appears to have been expressly granted when the debt was authorized. *United States v. New Orleans*, 98 U. S. 381; *Wolf v. New Orleans*, 103 U. S. 358; *Loan Assn. v. Topeka*, 20 Wall. 606; *Ralls County Court v. United States*, 105 U. S. 733. But when the laws of a State do prescribe the method of paying an indebtedness which a municipal corporation has contracted, and limit the rate of taxation for that purpose, such method of payment is exclusive. No court has the power to vary the mode of payment, or to increase the rate of taxation, although it may be that the means provided by the legislature for canceling the indebtedness are defective or insufficient." *Stryker v. Board of Comrs. of Grand County, Colo.*, 23 C. C. A. 286, 77 Fed. 567.

Authority to incur debt implies authority to tax.

633. (Fla. 1896.) "Where special or general authority is given to incur debt, full power to tax to an amount sufficient to meet both principal and interest at maturity may be inferred, where there is nothing expressed in the act to the contrary. If, in connection with the authority to create the debt, there is a special provision naming a limited rate of taxation for its discharge, the case is brought directly within the maxim, 'Expressio Unius est exclusio alterius.' *United States v. Macon County*, 99 U. S. 590." *United States, ex rel., Baer v. City of Key West*, 23 C. C. A. 663, 78 Fed. 88.

Implied authority to levy tax.

634. (Neb. 1903.) "But the power of the officers of a municipality to

levy sufficient taxes to pay its bonds is a legal inference from the authority of the city to issue the bonds, in the absence of any limitation or inhibition of this authority in the act which grants the power, in the general law, or in the Constitution. *Loan Assn. v. Topeka*, 20 Wall. 653, 660, 22 L. Ed. 455; *United States v. New Orleans*, 98 U. S. 381, 393, 25 L. Ed. 225; *Ralls County Court v. United States*, 105 U. S. 733, 735, 736, 26 L. Ed. 1220; *United States v. Clark Co.*, 96 U. S.

211, 24 L. Ed. 628; *Commonwealth v. Commissioners of Allegheny Co.*, 37 Pa. 277, 290; *Lowell v. Boston*, 111 Mass. 454, 460, 15 Am. Rep. 39; *Hassbrouck v. Milwaukee*, 25 Wis. 122."

The statutes of Nebraska and the power of municipal corporations of that State to levy taxes to pay their "district paving bonds" and "district curbing and guttering bonds" discussed at some length. *United States v. Saunders*, 59 C. C. A. 394, 124 Fed. 124.

C. Fund Applicable to Payment of Bonds.

Bonds issued by County Courts for townships; to be paid by tax on property in township.

635. (Mo. 1879.) Bonds issued by County Courts of counties in Missouri on account of townships of such counties are payable out of taxes levied on the property in the township.

"The bonds on their face acknowledge an indebtedness of the county 'for and on account of' the township. Since townships have no corporate organization of their own they act through the county, which, for this purpose, represents them as, under other circumstances, it does the people of the whole county." *Anthony v. County of Jasper*, 101 U. S. 693, 25 L. Ed. 1005.

Tax to pay precinct bonds issued by county commissioners in Nebraska.

636. (Neb. 1881.) Bonds issued by boards of county commissioners in Nebraska, on behalf of precincts of the county, are to be paid by a tax levied by the county commissioners upon the taxable property of the precincts.

Difference between precinct bonds and bonds issued for county purposes.

"The only difference between the two kinds of debt is that, in one all the taxable property of the county is charged with its payment, and in the other only a part. In both the mandamus to enforce the levy and collection of the necessary taxes lies to the proper officers of the county alone. This remedy is expressly provided for, and thus the presumption that might otherwise arise of an intention to

erect the precinct into a corporation for the purpose of these obligations, because, without it, the bonds could not be enforced, is rebutted. We think, however, that the special bonds which the county commissioners are to issue for the precincts are, in legal effect, the special bonds of the county payable out of a special fund to be raised in a special way."

Remedy of bondholders.

Mandamus against the county commissioners is the proper remedy to enforce payment of either class of bonds. *Davenport v. County of Dodge*, 105 U. S. 237, 26 L. Ed. 1018.

County road bonds in Indiana not county obligations.

637. (Ind. 1895.) Bonds issued by boards of county commissioners in Indiana for the construction of free gravel-roads under the laws of that State are not obligations of the county, but are payable solely from such assessments provided for by said laws. *Braun v. Comrs. of Benton County*, 17 C. C. A. 166, 70 Fed. 369.

Bonds issued by county for precinct; payable from tax on property in precinct; obligations of county.

638. (Neb. 1900.) Bonds issued by boards of county commissioners of counties in Nebraska, not under township organization, on behalf of precincts in such counties, are the obligations of the county.

"In legal effect they are the contracts of the county that it will pay the bonds, and the only difference between such bonds and the ordinary bonds of the county is not the obli-

gation of the county to pay them, but in the method by which the county may raise the money to discharge its own obligations. In the former case it may levy the taxes upon the property in the precinct which voted for their issue; in the latter case, upon

all the property in the county. But the obligation of the county to pay them is as sacred and effective in the one case as in the other." *Clapp v. Otoe County, Neb.*, 45 C. C. A. 579, 104 Fed. 473.

CHAPTER X.

DISSOLUTION, CONSOLIDATION AND REORGANIZATION OF MUNICIPAL CORPORATIONS; CHANGES AND REPEALS OF CHARTER POWERS; CREDITORS' RIGHTS, HOW AFFECTED.

When municipalities, after issuing their bonds, or otherwise by contract incurring obligations to pay, in pursuance of statutes authorizing such indebtedness and the levying of taxes to discharge the same, are dissolved or consolidated with others, or when such enabling or remedial statutes have been repealed or amended, how are the rights of holders of the obligations thereby affected?

In some such cases if the rights of the creditors depended entirely upon the will of the legislature of the State or the inclination of the debtor bodies, such creditor would be absolutely without remedy.

The Constitution of the United States provides (§ 10, art. 1) that "No state shall * * * pass any * * * law impairing the obligation of contracts." Similar provisions are found in most of the State Constitutions.

It has been repeatedly held by the Federal courts that statutes enacted by State legislatures repealing or amending laws authorizing the levying of taxes for the payment of a municipality's obligations, which were in force when such obligations were incurred, so as to take away or impair such taxing power, violate that constitutional provision.

It has also been held that when a municipality, after having legally incurred indebtedness to be paid by the levy and collection of taxes, has been dissolved and its corporate powers have ceased, a new corporation, organized under a new charter and embracing the same or substantially the same territory as the old one, and succeeding to its property and rights, will be held to have assumed its indebtedness and will be required to make provision for its payment, and the same rule has been enforced against an aggregate body formed by the consolidation of two or more municipal bodies.

See, in this connection, chapter XI, on the subject of Constitutional Law.

Dissolution of municipal corporation; new corporation succeeds to its rights and is liable for its debts.

639. (Fla. 1876.) "When, therefore, a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization. That such was the intention of the State of Florida in the present case, we have no doubt; to suppose otherwise would be to impute to her an insensibility to the claims of morality and justice, which nothing in her history warrants."

"So a change in the charter of a municipal corporation, in whole or part, by an amendment of its provisions, or the substitution of a new charter in place of the old one, should not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities." *Broughton v. Pensacola*, 93 U. S. 266, 23 L. Ed. 896.

640. (La. 1877.) Consolidated city liable for debts of constituent bodies without express declaration to that effect. *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521.

Changes in municipal corporations and their powers, subject to legislative regulation.

641. (Wis. 1879.) "Old towns may be divided and new ones incorporated out of parts of the territory of those previously organized; and in enacting such regulations the legislature may apportion the common property and the common burdens, and may, as between the parties in interest, settle

all the terms and conditions of the division of their territory, or the alteration of the boundaries, as fixed by any prior law. State legislation may regulate the subject; but if the legislature omits to do so, the presumption, as between the parties, is that they did not consider that any regulation was necessary. Where none is made, in case of division the old corporation owns all the public property within her new limits, and is responsible for all the debts of the corporation contracted before the act of separation was passed. Debts previously contracted must be paid entirely by the old corporation, nor has the new municipality any claim to any portion of the public property, except what falls within her boundaries, and to that the old corporation has no claim whatever. *Laramie County v. Albany County*, 92 U. S. 307; *Bristol v. New Chester*, 3 N. H. 521."

One town merged in two others.

"Where one town is by a legislative act merged in two others, it would doubtless be competent for the legislature to regulate the rights, duties, and obligations of the two towns whose limits are thus enlarged; but if that is not done, that it must follow that the two towns succeed to all the public property and immunities of the extinguished municipality. *Morgan v. Beloit, City and Town*, 7 Wall. 613, 617."

Not so where old town not extinguished.

"It is not the case where the legislature creates a new town out of a part of the territory of an old one, without making provision for the payment of the debts antecedently contracted, as in that case it is settled law that the old corporation retains all the public property not included within the limits of the new municipality, and is liable for all the debts contracted by her before the act of separation was passed. *Town of Depere and Others v. Town of Bellevue and Others*, 31 Wis. 120, 125."

One charter vacated, territory transferred to two others.

"Instead of that, it is the case where the charter of one corporation

is vacated and rendered null, the whole of its territory being annexed to two others. In such a case, if no legislative arrangements are made, the effect of the annulment and annexation will be that the two enlarged corporations will be entitled to all the public property and immunities of the one that ceases to exist, and that they will become liable for all the legal debts contracted, by her prior to the time when the annexation is carried into operation."

Territory and property of one corporation transferred to another.

"Grant that, and it follows that when the corporation first named ceases to exist there is then no power left to control in its behalf any of its funds, or to pay off any of its indebtedness. Its property passes into the hands of its successors, and when the benefits are taken the burdens are assumed, the rule being that the successor who takes the benefit must take the same cum onere, and that the successor town is thereby estopped to deny that she is liable to respond for the attendant burdens. *Swain v. Seamens*, 9 Wall. 254, 274; *Pickard v. Sears*, 6 Ad. & El. 474."

Liabilities passed with rights to succeeding corporations.

"Modifications of their boundaries may be made, or their names may be changed, or one may be merged in another, or it may be divided and the moieties of their territory may be annexed to others; but in all these cases, if the extinguished municipality owes outstanding debts, it will be presumed in every such case that the legislature intended that the liabilities as well as the rights of property of the corporation which thereby ceases to exist shall accompany the territory and property into the jurisdiction to which the territory is annexed. *Colchester v. Seaber*, 3 Burr. 1866."

Consolidated town assumes obligations of constituents.

"Express provision was made by the act annulling the charter of the debtor municipality for annexing its territory to the appellant towns; and, when the annexation became complete, the power of taxation previously vested in the inhabitants of the

annexed territory as a separate municipality ceased to exist, whether to pay debts or for any other purpose—the reason being that the power, so far as respected its future exercise, was transferred with the territory and the jurisdiction over its inhabitants to the appellant towns, as enlarged by the annexed territory; from which it follows, unless it be held that the extinguishment of the debtor municipality discharged its debts without payment, which the Constitution forbids, that the appellant towns assumed each a proportionate share of the outstanding obligations of the debtor town when they acquired the territory, public property, and municipal jurisdiction over everything belonging to the extinguished municipality."

"Pecuniary burdens may be increased or diminished by the change; but, in the absence of express provisions regulating the subject, it will be presumed in every case where both municipalities are continued, that the outstanding liabilities of the same remain unaffected by such legislation. Unlike that in this case, the charter of the old town was vacated and annulled, from which it follows that the same principles of justice require that the appellant towns, to which the territory, property, and inhabitants of the annulled municipality were annexed, should become liable for its outstanding indebtedness." *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699.

Rights of creditors on dissolution of municipal corporation.

642. (Tenn. 1880.) In a cause in equity in which complainants, judgment-creditors of the city of Memphis, whose charter had been repealed by the legislature, prayed that a receiver be appointed to take charge of the assets of the city, including her tax-books and bills for past due and imposed taxes, and that he be clothed with the power conferred by statutes of Tennessee relied upon, the court held, on consideration of said statutes:

1. Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire engines, hose and hose carriages, engine-houses, engineering instruments, and generally everything held for governmental pur-

poses, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation. Upon the repeal of the charter of the city, such property passed under the immediate control of the State, the power once delegated to the city in that behalf having been withdrawn.

2. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation. The doctrine of some of the States, that such property can be reached directly on execution against the municipality, has not been generally accepted.

3. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature.

4. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be collected through the instrumentality of a court of chancery at the instance of the creditors of the city. Such taxes can only be collected under authority from the legislature. If no such authority exists, the remedy is by appeal to the legislature, which alone can grant relief.

5. The receiver and back-tax collector appointed under the authority of the act of March 13, 1879, is a public officer, clothed with authority from the legislature for the collection of the taxes levied before the repeal of the charter. The funds collected by him from taxes levied under judicial direction cannot be appropriated to any other uses than those for which they were raised. He, as well as any other agent of the State charged with the duty of their collection, can be compelled by appropriate judicial orders to proceed with the collection of such taxes by sale of property or by suit or in any other way authorized by law, and to apply the proceeds upon the judgments."

An extended discussion will be found in the opinion. *Meriwether v. Garrett*, 102 U. S. 472, 28 L. Ed. 197.

Assumption by consolidated city, under legislative authority, of the debts of constituent municipalities; subsequent legislation impairing taxing power.

643. (La. 1881.) "The acts of 1852 consolidated the three previously existing municipalities within the limits of New Orleans into one, and added to it the adjacent city of Lafayette. The new corporation took all the property and interests of the municipalities, and of Lafayette, and consequently became subject to their obligations. The advantages which accrued from the possession of their property were accompanied with the burdens of their debts. This liability was not, however, left to rest upon any general principles of corporate liability in such cases. The legislature recognized its existence, and in consolidating the municipalities and the corporation of Lafayette, declared that the debts of the old corporation, of the municipalities and of that city, should be assumed and paid by the city of New Orleans, which was declared to be liable therefor. The first of the acts appointed commissioners of the debt thus consolidated, and authorized them to issue new bonds of the city having forty years to run, with interest coupons payable semi-annually in exchange for the obligations and debts of the old corporation, and of the municipalities, to which the debts of Lafayette were subsequently added by the supplementary act. To meet the interest it provided that the common council of the city should annually, in the month of January, pass an ordinance to raise the sum of \$600,000, increased to \$650,000 by the supplementary act, by a special tax on real estate and slaves, to be called the consolidated loan tax. It also provided that any surplus remaining at the end of each year, after payment of the interest on these bonds, and the expenses of managing the debt, should be applied to the purchase of such of the bonds as might have the shortest period to run. These provisions, until the bonds were accepted, were in the nature of proposals to the creditors of the old city, of the municipalities, and of Lafayette. The State in effect said to them: The city will give these bonds, running for the period designated, and drawing interest, in ex-

change for your demands; and as security for the payment of interest, and the gradual redemption of the principal, the city shall annually, in January levy a special tax for that purpose to the amount of \$650,000. The provisions were designed to give value to the proposed bonds in the markets of the country, and necessarily operated as an inducement to the creditors to take them. When the bonds were issued and taken by the creditors, a contract was consummated between them and the city as fully as if all the provisions had been embodied as express stipulations in the most formal instrument signed by the parties. On the other hand, the creditors surrendered their debts against the former municipalities; and, on the other hand, in consideration of the surrender, the city gave to them its bonds, which carried the pledge of an annual tax of a specified amount for the payment of interest on them, and ultimately of the principal. The annual tax was the security offered to the creditors; and it could not be afterwards severed from the contract without violating its stipulations, any more than a mortgage executed as security for a note given for a loan could be subsequently repudiated as forming no part of the transaction. Nearly all legislative contracts are made in a similar way. The law authorizes certain bonds to be issued, or certain work to be done upon specified conditions. When these are accepted, a contract is entered into imposing the duties and creating the liabilities of the most carefully drawn instrument embodying the provisions. *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Hartmen v. Greenhow*, 102 U. S. 672; *People v. Bond*, 10 Cal. 563; *Brooklyn Park Co. v. Armstrong*, 45 N. Y. 235. *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090.

Succeeding municipality liable for debts of extinct corporation.

644. (Ala. 1886.) On the same day two acts were passed by the Alabama legislature; one annulling the charter of Mobile and dissolving the corporation; the other incorporating the Port of Mobile. The latter corporation though not including all the territory within the former included the thickly-settled portions of the former and all but a small portion of its tax-

able property and inhabitants and most of its public property.

"We are of opinion, upon this state of the statutes and facts, that the Port of Mobile is the legal successor of the City of Mobile, and liable for its debts. The two corporations were composed of substantially the same community, included within their limits substantially the same taxable property and were organized for the same general purposes. Where the legislature of a State has given a local community living within designated boundaries, a municipal organization and by a subsequent act or series of acts repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body under a new name for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former, and liable for its debts; and if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new."

An extended discussion and number of authorities reviewed. *Mobile v. Watson*; *Same v. United States ex rel. Watson*, 116 U. S. 289, 6 Sup. Ct. Rep. 398, 20 L. Ed. 620.

New corporation, succeeding to property and territory of old one, bound for latter's debts.

645. (Tex. 1897.) The city of San Angelo, Tex., was abolished by decree of court on account of illegality in its incorporation. Soon thereafter the city was again incorporated including the principal portions of the territory, streets, property, etc., of the former incorporation.

On the question as to the liability of the new corporation for the debts of the old, the court say:

"The State's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether, is not restricted by contracts entered into by the mu-

municipality with its creditors or with private parties. An absolute repeal of a municipal charter is therefore effectual so far as it abolishes the old corporate organization; but when the same or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights, and subject to its liabilities. *Dillon's Mun. Corp.*, vol. 1, § 172, 4th ed."

Statutes designed to extinguish debts of old corporation unconstitutional.

(Tex. 1897.) Held, also, that if the act creating the new corporation should be construed as leaving the assumption of such liability by the corporation to the option of its inhabitants or taxpayers, it would follow that in that respect it would have the effect of impairing the obligations of existing contracts and would be unconstitutional and void. *Shapleigh v. San Angelo*, 167 U. S. 646, 17 Sup. Ct. Rep. 957, 42 L. Ed. 310.

Incorporated city, successor to a town, liable for latter's debts.

646. (Ga. 1896.) "In our view of the law, we see no reason that would forbid the town of Clarksdale, if it had been in existence when the railway work was completed, to issue negotiable bonds in compliance with the said subscription contract between itself and the railway company. When the town of Clarksdale was dissolved, and the municipality of the city of Clarksdale was incorporated for the same constituency that had previously been incorporated in the town of Clarksdale, we think the law, without any further or special legislative authority, imposed on defendant city therefor the obligation to discharge the lawful outstanding and unsatisfied debts of the town of Clarksdale. What was that debt or obligation? It was to give negotiable bonds, evidences of indebtedness, bearing 6 per cent., running twenty years, in payment of the amount of the said subscription. See *Broughton v. Pensacola*, 93 U. S. 266; *Mt. Pleasant v. Beckwith*, 100 id. 514, and *Mobile v. U. S.*, 116 id. 289, 6 Sup. Ct. Rep. 398." *Pacific Improvement Co. v. City of Clarksdale*, 20 C. C. A. 635, 74 Fed. 528.

Dissolution and reincorporation.

647. (Tex. 1899.) A city after insuring its bonds in pursuance of legal authority was dissolved in quo warranto proceedings. Thereafter a new incorporation was effected. Held, that the city as reincorporated was liable on the bonds. *City of Uvalde v. Spier*, 33 C. C. A. 501, 91 Fed. 594.

Consolidation of municipalities; payment of debts; charter provisions construed.

648. (N. Y. 1900.) The town of Gravesend, N. Y., after issuing its bonds under legal authority, was annexed to the city of Brooklyn by an act which provided that the city of Brooklyn should not be liable to pay any debt, liability, or obligation of the town previously contracted or incurred, and further provided that the property of the town should remain liable therefor, and that the taxes therefor should be raised upon such property in the same manner and by the same officers as the taxes of other wards of the city. Subsequently, by the act known as the "Greater New York Charter," the city of Brooklyn and other corporations were consolidated with the city of New York. That act provided, among other things, that all the laws theretofore passed, creating any municipal debt of the corporations consolidated, should remain in full force and effect, except that the same should be carried out by the corporation of the city of New York. The holders of the bonds so issued by the town of Gravesend commenced a suit in equity against the city of Brooklyn to establish the validity of the bonds and to compel the registration of the same, and after the consolidation of the city of Brooklyn with New York a decree was rendered in that suit directing the registration of the bonds by the comptroller of the city of New York, and adjudging that that city pay the accrued interest upon the bonds according to the terms thereof. On the question whether the bonds were enforceable against the city of New York, the court say:

"Although by the provisions of the act annexing the town of Gravesend to the city of Brooklyn the latter was not to be liable for the previous debts of the town, and the property of the city not acquired by the

annexation was exempt from taxation for the payment of such indebtedness, the power and the duty were devolved upon the city by the act to raise the moneys necessary to pay such indebtedness by taxation of the property annexed. This duty it was bound to fulfill, as otherwise the creditors of the town would be remediless. It cannot be doubted that the creditors of the town could, before the enactment of the Greater New York charter, have compelled the authorities of the city of Brooklyn, by mandamus, to assess and collect the necessary tax. Were it not so, the provision exempting the city of Brooklyn from liability for the debts of the town would have been void, because unconstitutional. Where the resource for the payment of the debts of a municipal corporation is the power of taxation existing when the debt was created, any law which withdraws or limits the taxing power, and leaves no adequate means for the payment of the debt, is forbidden by the Constitution of the United States and is null and void."

"The power thus devolved upon the city of Brooklyn has been destroyed by the provisions of the Greater New York charter. The remedy by a mandamus has been destroyed because there is no longer any corporate body or officials to execute the mandate, and section 7 of the charter enacts that no municipal corporation whose territory is thereby annexed to the city of New York shall 'levy any tax or assessment upon property within the city of New York as herein constituted.' Section 5 of the charter enacts that all the valid debts of the municipal corporations, towns, incorporated villages, and school districts therein united and consolidated, as well as the debts of the city of New York, shall be common debt of the city of New York as thereby constituted, and that, so far as resort to taxation is authorized or necessary to pay such debts, such taxation shall extend equally throughout the territory of the corporation herein constituted; 'it being the intent hereof that the obligations and liabilities of the city of New York, as the successor of the municipal and public corporations

consolidated in it, shall be the same as and not otherwise or greater than the respective obligations and liabilities of the several constituent corporations; and that the city of New York shall succeed to all their rights as well as to their obligations and liabilities in respect thereof.'

"The town of Gravesend was not enumerated as one of the consolidated municipalities, and as it had become extinct as a municipality, it may be that the literal terms of the section referred to do not describe it. We cannot suppose, however, that it was the legislative intention that the Greater New York charter should impair the obligations of the contract between the town of Gravesend and its creditors, by destroying the remedy for enforcing the contract, or should withhold from the city of New York the power to tax the property of that town for the payment of its debts, while granting to it the power to tax such property for the payment of the debts of all the consolidated municipalities. Yet such would be the effect of the legislation unless section 5 is construed to mean that the valid debts contracted by any town, whether one having a corporate existence at the time of the enactment, or one which had lost its corporate existence by a merger with one of the constituent municipalities, are to be regarded as a part of the common debt of the city of New York. While the phraseology, read literally, may not include the debts of an extinguished municipality whose property has passed to another municipality, and from the latter to the city of New York, a more liberal reading, and one which we think accords with the legislative intention, would include them."

"Upon the conclusions we have reached, the city of New York would be liable in an action at law; but as the defense of an adequate remedy at law has not been raised by the answer, and no assignment of error has challenged the jurisdiction of the court below, we do not deem it necessary to decide that the complainant's bill should not have been entertained." *D'Esterre v. City of New York et al.*, 44 C. C. A. 75, 104 Fed. 605.

Dissolution of township and organization of new township as part of newly formed county after issuance of bonds.

649. (S. Car. 1905.) "In 1895 South Carolina adopted a new Constitution, by which it was provided that the several township of the State, with names and boundaries as then established, should continue, with power, however, in the legislature, to form other townships or change the boundaries of those established. Article VII. This section, by an amendment finally adopted in 1903, was made inapplicable to certain townships, including Ninety-six. It was provided that 'the corporate existence of the said townships be, and the same is, hereby destroyed, and all offices in said townships are abolished and all corporate agents removed.' 24 Stat. S. Car. (1903), 3.

"At the time of the execution of the bonds township Ninety-six was situated in Abbeville county, and in 1896 the county of Greenwood was organized out of portions of Abbeville and Edgefield counties, and township Ninety-six was included in Greenwood county.

"The officers of the latter county refused to assess and collect the taxes, contending that they are not officers of the county, but officers of the State, appointed by the governor of the State, and are termed county officers because assigned to duty in that county, but cannot exercise any function of those officers except as authorized by the laws of the State, and that they have been forbidden by an act of the general assembly of the State to assess or collect taxes for the payment of subscriptions by townships to the building of roads which have not been built. 23 Stat. S. Car. (1899), 78.

"Against this defense defendants in error invoke the contract clause of the Constitution of the United States."

Held: "The power of the State to alter or destroy its corporations is not greater than the power of the State to repeal its legislation. Exercise of the latter power has been repeatedly held to be ineffectual to impair the obligation of a contract. The repeal of a law may be more readily

undertaken than the abolition of townships or the change of their boundaries or the boundaries of counties. The latter may put on the form of a different purpose than the violation of a contract. But courts cannot permit themselves to be deceived. They will not inquire too closely into the motives of the State, but they will not ignore the effect of its action. The cases illustrate this. There may indeed be a limitation upon the power of the court. This was seen and expressed in *Heine v. Levee Commission*, and *Meriweather v. Garrett*, *supra*. There is no limitation in the case at bar. A tax has been provided for and there are officers whose duty it is to assess and collect it. A court is within the line of its duty and powers when it directs those officers to the performance of their duty; and their objects upon which the tax can be laid. It is the property within the boundaries of the territory that constituted township Ninety-six.

"*Mount Pleasant v. Beckwith*, 100 U. S. 514, and *Mobile v. Watson*, 116 U. S. 289, are cases in which municipal corporations had incurred indebtedness, and afterward their municipal organization was destroyed and their territory added to other municipalities. It was argued in those cases, as it is argued in this, that such alteration or destruction of the subordinate governmental divisions was a proper exercise of legislative power, to which creditors had to submit. The argument did not prevail. It was answered, as we now answer it, that such power, extensive though it is, is met and overcome by the provision of the Constitution of the United States which forbids a State from passing any law impairing the obligation of contracts. See, also, *Shapleigh v. San Angelo*, 167 U. S. 646. And this is not a limitation, as plaintiffs in error seem to think it is, of the legislative power over subordinate municipalities—either over their change or destruction. It only prevents the exercise of that power being used to defeat contracts previously entered into." *Graham, County Auditor, v. Folsom*, 200 U. S. 248, 26 Sup. Ct. Rep. 245, — L. Ed. —.

Dissolution of township and organization of new township as part of newly formed county after issuance of bonds; levy and collection of taxes enforced to pay judgment on such bonds.

650. (S. Car. 1905.) (See No. 649.)
Graham, County Auditor, v. Folsom,
200 U. S. 248, 20 Sup. Ct. Rep. 245,
— L. Ed. —.

CHAPTER XI.

CONSTITUTIONAL LAW.

- A. Principles of constitutional law; partial invalidity of statute.
- B. Laws impairing obligation of contracts; retroactive laws.
- C. Due process of law; equal protection of the laws.
- D. Constitutional provisions, when prospective.
- E. That laws shall embrace but one subject, which shall be expressed in the title.
- F. Inhibitions against special legislation; uniform operation.
- G. Miscellaneous.

The Constitutions of the several States contain limitations and restrictions upon the powers of the legislatures and municipalities of the States, and the Constitution of the United States contains a few such restrictions or limitations, notwithstanding that instrument, for the most part, consists of delegations of power by the States to the Federal government.

Subject to the restrictive provisions of the Federal Constitution, the Constitution of a State is its fundamental law, and neither the State nor the public bodies created by it can exercise any power not in harmony with such paramount law.

In some instances certain powers are recognized, but limited or regulated by constitutional provisions, and in others the exercise of certain powers is inhibited. Such provisions are mandatory, and generally any acts attempted to be done in contravention of them are nullities.

Such constitutional provisions, and their effect as limitations or restrictions upon State and municipal legislation, are most important and interesting branches of municipal law. The Federal courts have had to decide many cases involving such questions arising under both the Federal and State Constitutions. In the decision of any question arising under the Federal Constitution, those courts exercise a supreme and independent judgment, but in questions involving the construction of constitutional or statutory provisions of the States, those courts will generally adopt

and follow the decisions of the highest courts of the respective States, when no Federal question is involved. (See chapter XVI.)

In many cases in which the validity of municipal bonds has been involved, the controlling question has been as to the constitutionality of the act relied on as authority for their issuance or of laws relied upon to authorize the levy of taxes or assessments for their payment. A statute in so far as it violates any mandatory provision of the State or Federal Constitution is a nullity, and of course can confer no power; and bonds issued, or other acts done by virtue of such statutes only, are equally void.

A discussion of principles of constitutional law or of constitutional provisions is beyond the scope of this article, but a reference to some of the most important of such provisions affecting the powers that may be exercised by, or conferred upon, municipal and quasi-municipal bodies may not be inappropriate.

The Federal Constitution contains provisions prohibiting the States from passing *ex post facto* laws, or laws impairing the obligation of contracts; and prohibiting any State from depriving any person of life, liberty, or property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws; and provisions of similar import are contained in State Constitutions.

In the Constitutions of some of the States are found inhibitions against, or limitations upon, the power of the legislature to enact special laws or laws authorizing public corporate bodies to become stockholders in, or to raise money for, or loan their credit to, or in aid of, any corporation or association. Other provisions equally important, affecting the power of the lawmaking bodies, might be mentioned, but the foregoing will be sufficient to serve as illustrations.

To the extent that any statute violates any such constitutional provision it is of course a nullity, but it does not necessarily follow in case of such violation that the entire act is void. In some such cases the entire act will be held to be void, and in others only the particular obnoxious provisions may be so treated, and the balance of the act sustained, but upon this particular point it will be profitable to consult the decisions of the State courts.

There are some constitutional provisions which reach beyond the legislature of the State, and are directed to State or municipal officers, and are intended to control them in the exercise of their official powers and duties. A few instances will suffice

as illustrations of this class. In a number of the State Constitutions there are provisions limiting the amount of indebtedness that may be incurred, or taxes levied by municipalities. In some there are provisions to the effect substantially that no debt shall be created by a municipality, unless at the same time provision is made to assess and collect an annual tax for the payment of the interest as it accrues, and to provide for the ultimate payment of the principal sum. Other provisions require that before indebtedness may be incurred, or taxes levied, by public bodies, the same shall be approved by the voters of the body. Such provisions are generally treated as jurisdictional, going to the power of the municipality to act, but the Federal cases present some exceptions. Such provisions are matters of law, of which all must take notice, but whether such requirements, intended to be conditions precedent, have been complied with in a given case, is a question of fact, the determination of which is generally referred by law to some officer or board or tribunal of the municipality; and the decision by such agency that they have been complied with, and representations that they have been so complied with, made by officials expressly or impliedly authorized to make them on behalf of the body which they represent, by recitals in the bonds, or by ordinances, resolutions, etc., or in some other approved form, have been held in some cases to be binding upon the municipality, and to estop it from showing non-compliance. The cases in which the rule of estoppel has been so applied, as well as those in which it has not, will be found cited in chapter VII, and in chapter IV, part C.

A. Principles of Constitutional Law; Partial Invalidity of Statute.

No contract is created merely by favorable vote for subscription.

651. (Ind. 1848.) The charter of the Ohio & Mississippi Railroad Company, passed February 14, 1848, authorized the county commissioners of counties through which the railroad passed to subscribe for stock of the company on behalf of the county at any time within five years after opening the books of subscription, if a majority of the qualified voters of the county, at an annual election, should vote for the same. January 15, 1849, the charter was so amended as to require such election to be held on the first Monday of March, 1849. The election in Daviess county, so held, resulted in favor of such subscription.

September 10, 1852, the board of county commissioners subscribed for the stock, and issued therefor the bonds of the county involved in this suit. The new Constitution of Indiana, which took effect November 1, 1851, contained the following provision:

"No county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription; nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any company."

The first question presented was:

"Whether, by the said act of incorporation of said railroad company,

and the amendment thereto of January 15, 1849, any such right to county subscriptions vested in said company as would exclude the operation of the new Constitution of Indiana, which took effect on the 1st November, 1851."

The second question presented was: "Whether, by virtue of said acts, and of the said election in the declaration set forth, the Ohio and Mississippi Railroad Company acquired any such right to the subscription of the defendants as would be protected by the Constitution of the United States against the new Constitution of Indiana, which took effect the 1st November, 1851."

"It is insisted that the contract of subscription became complete when, at the election, a majority of the votes was cast in its favor, and did not require the form of a subscription on the books for the stock of the railroad company to make it obligatory upon the parties; and which, if true, it is agreed the contract would be protected within the Constitution of the United States, as it would then have been complete before the constitutional prohibition of Indiana. But the court is unable to concur in this view.

"It holds, that a subscription was necessary to create a contract binding upon the county, on one side, to take the stock and pay in the bonds; and, upon the other, to transfer the stock, and receive the bonds for the same. Until the subscription is made, the contract is unexecuted, and obligatory upon neither party." *Aspinwall v. Davies County Comrs.*, 22 How. 364, 16 L. Ed. 296.

Rules of construction of federal and state constitutions.

652. (Nebr. 1872.) "It is true that, in construing the Federal Constitution, Congress must be held to have only those powers which are granted expressly or by necessary implication, but the opposite rule is the one to be applied to the construction of a State Constitution. The legislature of a State may exercise all powers which are properly legislative, unless they are forbidden by the State or National Constitution. This is a principle that has never been called in question." *Railroad Co. v. County of Otoe*, 16 Wall. 667, 21 L. Ed. 375.

Railroad aid; constitutionality of mandatory statutes; of enabling statutes.

653. (N. Y. 1873.) Though a mandatory statute requiring a municipal corporation to subscribe for stock in a railroad company, or to contribute to the construction of a railroad, may not be a legitimate exercise of legislative power, a mere grant of power to a municipality, upon conditions, coupled with a prescription of the mode in which the power might be exercised, is a constitutional exertion of legislative power. *Town of Queensbury v. Culver*, 19 Wall. 83, 22 L. Ed. 100.

Unconstitutionality of statute must be clear.

654. (Mich. 1873.) "It is an axiom in American jurisprudence that a statute is not to be pronounced void upon this ground, unless the repugnancy to the Constitution be clear, and the conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment. The particular clause of the Constitution must be specified and the act admit of no reasonable construction in harmony with its meaning. The judicial function involving such a result is one of delicacy, and to be exercised always with caution." *Pine Grove Township v. Talcott*, 19 Wall. 666, 22 L. Ed. 227.

Power of congress over territorial legislation.

655. (Dak. Ter. 1879.) "In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the States." *National Bank v. County*

of Yankton, 101 U. S. 129, 25 L. Ed. 1046.

Partial invalidity of statute; when balance will stand; intent of legislature; rule stated.

656. (Mo. 1880.) "It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected."

"But, if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.' The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."

Provision prohibiting legislative authorization of municipal aid except upon two-thirds vote; not self-executing; legislation necessary.

The Constitution of Missouri contained the following provision: "The general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." Held, that this provision was not self-executing; that it did not authorize a city to extend aid to a railroad company, even though at an election more than two-thirds of the voters gave their assent. *Legislative authority was necessary.* *Allen v. Louisiana*, 103 U. S. 80, 26 L. Ed. 318.

Unconstitutional law can confer no power.

657. (Ill. 1881.) "That which is not a law can give no validity to

bonds purporting to be issued under it, even in the hands of those who take them for value and in the belief that they have been lawfully issued." *Post v. Supervisors*; *Amoskeag Bank v. Ottawa*, 105 U. S. 667, 26 L. Ed. 1204.

Construction of statute should be in harmony with constitution, if fair meaning of words will permit.

658. (Miss. 1884.) "But if there were room for two constructions, both equally obvious and reasonable, the court must, in deference to the legislature of the State, assume that it did not overlook the provisions of the Constitution, and designed the act of 1871 to take effect. Our duty, therefore, is to adopt that construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the Constitution. *Cooley Constitutional Law*, 184-5; *Newland v. Marsh*, 19 Ill. 376, 384; *People v. Supervisors*, etc., 17 N. Y. 235, 241; *Colwel v. May*, 4 C. E. Green (19 N. J. Eq.), 245, 249. And such is the rule recognized by the Supreme Court of Mississippi in *Marshall v. Grimes*, 41 Miss. 27, 31, in which it was said: 'General words in the act should not be so construed as to give an effect to it beyond the legislative power, and thereby render the act unconstitutional. But, if possible, a construction should be given to it that will render it free from constitutional objection, and the presumption must be that the legislature intended to grant such rights as were legitimately within its power.' Again, in *Sykes v. Mayor*, etc., 55 Miss. 115, 143: 'It ought never to be assumed that the law-making department of the government intended to usurp or assume power prohibited to it.' And such construction (if the words will admit of it) ought to be put on its legislation as will make it consistent with the supreme law." *Grenada County Supervisors v. Brodgen*, 112 U. S. 261, 5 Sup. Ct. Rep. 125, 28 L. Ed. 704.

659. (Tenn. 1886.) "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178.

Self-executing constitutional provision.

660. (Ill. 1887.) The Constitution of Missouri which took effect August 8, 1870, contained the provision that "any county, city, school district, or other municipal corporation, incurring any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same."

The relator had recovered a judgment against the city of East St. Louis on its bonds, and prayed for a writ of mandamus requiring the levy and collection of a tax to pay the same. The question was as to the amount of tax the council of the city was authorized to levy for the payment of the judgment. Held, that the Constitution of 1870 removed the charter limitation on the city's power of taxation to pay its indebtedness thereafter contracted by it, and gave it authority to levy and collect sufficient tax to meet the interest as it fell due and the principal within twenty years.

"In this case the Constitution limited the power of the legislature of Illinois in respect to the grant of authority to municipal corporations to incur debts, but it declared in express terms that, if a debt was incurred under such authority, the corporation should provide for its payment by the levy and collection of a direct annual tax sufficient for that purpose. Under this provision of the Constitution, no municipal corporation could incur a debt without legislative authority, express or implied, but the grant of authority carried with it the constitutional obligation to levy and collect a sufficient annual tax to pay the interest as it matured and the principal within twenty years. This provision for the tax was written by the Constitution into every law passed thereafter by the legislature allowing a debt to be incurred; and, in our opinion, it took the place in existing laws of all provisions for taxation to pay debts thereafter incurred under old authority which were inconsistent with its requirements. It was made by the people a part of the fundamental law of the State that every debt incurred thereafter by a municipi-

pal corporation, under the authority of law, should carry with it the constitutional obligation of the municipality to levy and collect all the necessary taxes required for its payment." *East St. Louis v. Amy*, 120 U. S. 600, 7 Sup. Ct. Rep. 739, 30 L. Ed. 798.

Constitutional provision operating directly upon municipalities.

661 (Tenn. 1889.) The Constitution of Tennessee of 1870 declared as follows:

"But the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city, or town, become a stockholder, with others, in any company, association, or corporation, except upon a like election, and the assent of a like majority."

"It is clear that the inhibition imposed by section 29 of the Constitution of 1870 operates directly upon the municipalities themselves, and is absolute and self-executing; and although power is reserved to the legislature to enable them to give or loan their credit, and to become stockholders, upon the assent of three-fourths of the votes cast at an election to be held by the qualified voters, the county, city or town is destitute of the power to do so until legislation authorizing such election and action thereupon is had. The prohibition of the gift or loan of credit or the subscription to stock without a three-fourths vote, is not an affirmative grant of authority to give or loan credit or to become a stockholder upon a three-fourths vote."

"The inhibition being self-executing and operating directly upon the municipality, and not in itself enabling the latter to proceed in accordance with the prescribed limitation, further legislation is necessary before the municipality can act." *Norton v. Board of Comrs. of the Taxing District of Brownsville*, 129 U. S. 479, 9 Sup. Ct. Rep. 322, 32 L. Ed. 774.

Constitution and statutes should be reconciled.

662. (S. Car. 1895.) "But we think that in construing the statute or char-

ter, the presumption is that the legislature intended that bonds might be issued to the full limit authorized by the Constitution,—‘in any amount not prohibited by the organic law. If the said section of the charter and the requirement of the Constitution alluded to can be reconciled, it must be done, and, in our judgment, there is no difficulty in doing so.’ *Town of Darlington v. Atlantic Trust Co.*, 16 C. C. A. 28, 68 Fed. 849.

Restrictive provisions of a state constitution do not confer authority.

663. (Colo. 1897.) “Section 6 of article 11 of the Constitution of Colorado is wholly restrictive in its effect and operation, and does not by its terms authorize any county to incur any form of indebtedness for any purpose. It forbids the contracting of a debt of a specified kind, except for specified purposes, and within specified limits, and forbids the contracting of indebtedness of any and all kinds beyond specified limits, and then prescribes an enlarged limit as to indebtedness, after a county shall have been authorized by vote of the qualified electors, in the manner indicated, with a provision in respect to bonds, if any be issued. But it does not by its own terms grant to any county the power to incur indebtedness, even within the specified restrictions. The authority to grant such power, within such restrictions, therefore, necessarily remains in the legislature, which might, in its discretion, prescribe further limitations and restrictions, and provide in detail in respect to the manner in which the power should be executed, and in respect to what acts should be done, and what record made in the execution of such power, and as to the effect of such acts and records.” *Dudley v. Board of Comrs. of Lake County, Colo.*, 26 C. C. A. 82, 80 Fed. 672.

Special assessments provided for by unconstitutional law not enforceable except when persons assessed may be estopped by their own acts.

664. (Ill. 1899.) In this case holders of bonds issued under an unconstitutional law sought to have property, alleged to have been benefited by the improvement, charged with special assessments provided in the act for the payment of the amount

of the bonds, on the ground of participation by the owners of the property in procuring the passage of the act, and promoting the work and acquiescing in the expenditure of the proceeds of the bonds with the object of benefiting their property. Held, that the plaintiff was not entitled to relief, as there were not sufficient grounds for applying the rule of estoppel against the landowners. *O'Brien et al. v. Wheelock et al.*, 37 C. C. A. 309, 95 Fed. 883.

Bonds may be valid, though assessment made for their payment is invalid.

665. (Iowa, 1901.) If the assessment made against abutting property to pay the cost of improving a street were so made in violation of the Fourteenth Amendment to the Constitution of the United States, “it would not follow that the bonds issued to raise the money for the payment of the improvement in the first instance would be thereby rendered void. The improvement has been in fact made, and the city has received from the purchaser of the bonds the full value thereof. All that is held in *Norwood v. Baker* is that the mode of assessment provided for in the particular ordinance of the village was invalid and unconstitutional, but it is therein expressly held that the village might in some other legal way make an assessment to meet the expense of the improvement in question; and it is clear that the court would not be justified in holding that Lyons City was absolved from all liability for the money it received from complainant simply because it is required to levy the assessment needed to raise the funds to pay the bonds in such a method as will not impose an unjust burden on the owners of the abutting property.” *Burlington Sav. Bank v. City of Clinton, Iowa*, 106 Fed. 269.

Jurisdiction of supreme court; constitutional law; partial invalidity of statute.

666. (Ohio, 1900.) This was a suit at law upon bonds issued by a township in Ohio for the purpose of raising means to meet the cost of widening and extending a certain avenue within its limits. The act under which the bonds were issued required the township trustees to proceed with the improvement of the street design-

nated, and directed them to issue the bonds of the township to meet the expenses of the improvement, and further provided that the trustees should receive compensation for their services in the matter not exceeding \$25 each, "which with all costs and expenses of constructing the improvement together with the interest on any bonds issued for the same should be levied and assessed upon each front foot of the lots and lands abutting on each side of said Williams avenue between the termini mentioned," etc.

The petition alleged that the plaintiff was a bona fide holder of the bonds. The bonds which were set out in the petition recited the act under which they were issued, and acknowledged the township indebted to the bearer in their respective sums, and contained the promise of the township trustees and their successors to pay the same to the bearer. On a demurrer to the petition, the points urged in the Circuit Court by the township trustees were:

1. That the petition did not show that the plaintiff was the original holder of the bonds sued on, and, if he were an assignee or subsequent holder thereof, he was not entitled to maintain the action, because the bonds were payable to bearer, and were not made by a corporation.

2. That the act of the general assembly, under and by virtue of which the bonds were issued, was in violation of the Constitution of the State, and therefore the bonds were invalid.

3. That the act contravened the provisions of the Constitution of the United States; and therefore the bonds were invalid.

Jurisdiction of the supreme court on error.

On error in the Supreme Court, held, "By the 5th section of the Circuit Court of Appeals Act, appeals or writs of error may be prosecuted to this court from the Circuit Court 'in any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States.' 26 Stat. at L. 826, 827, 828, chap. 517."

After an extended discussion of the question of the jurisdiction of Supreme Court on error, held, further, that "The result is that this court has jurisdiction to review the judgment of the Circuit Court, and to

determine every question properly arising in the case. We may therefore determine whether the court below erred in sustaining the demurrer to the petition." Held, also, that, within the meaning of the Judiciary Act of August 13, 1888, the defendant, the board of trustees of the township, was a corporation.

Was the statute in violation of the fourteenth amendment to the constitution of United States?

"We are of opinion that the Circuit Court erred in holding that the petition made a case that necessarily brought it within the decision in *Norwood v. Baker*, so far as the relief sought by the plaintiff was concerned."

Unconstitutionality of one section of an entire act.

If the third section of the act prescribing a rule for levying special assessments be invalid, upon which no opinion is expressed, it would not follow that the township would escape liability on the bonds.

"The 4th section of the act, authorizing and directing bonds to be issued for the purpose of raising the money necessary to meet the expenses of the improvement in question, may stand with sections 1 and 2, even if section 3 were held to be void as prescribing an illegal mode of assessment. The power to issue bonds to raise the money, and the mode in which the township should raise the necessary sums to pay the bonds when due, as well as the interest accruing thereon from time to time, are distinct and separable matters. If the act under which the bonds were issued had not contained any provision whatever for an assessment to raise money to meet them, the township could not have repudiated its obligation to pay the bonds; for in the act would be found the command of the legislature to widen and extend Williams avenue, to immediately secure by proceedings in the Probate Court the land required for the proposed work, to issue bonds to raise the money necessary to meet the expenses of the improvement. We ought not to hold the statute invalid if it failed to provide some legal mode of assessment to raise money to pay the bonds when they matured, with the interest accruing thereon. The statute, so far as the question of the power to issue bonds and put them

on the market is concerned, may be carried into effect without reference to the third section. So that, if that section were held void under *Norwood v. Baker*, the remaining sections being valid, can stand and their provisions be executed."

Unconstitutionality of a portion of one section of an act.

The court adopts the language of the opinion in *Fayette County Treasurer v. Peoples' & Drovers' Bank*, 47 Ohio St. 503, 523, as follows:

"The question arises, however, whether, if that portion of the section is declared wholly or in part unconstitutional and void, it may not result in invalidating the entire section. As one section of a statute may be repugnant to the Constitution without rendering the whole act void, so, one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand, while another will fall, unless the two are so connected, or dependent on each other in subject-matter, meaning, or purpose, that the good cannot remain without the bad. The point is not whether the parts are contained in the same section, for

the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance—whether the provisions are so interdependent that one cannot operate without the other."

"All that we now decide is that, even if the third section of the State statute in question be stricken out as invalid, the petition makes a case entitling the plaintiff to a judgment against the township."

Rule of decision of State court at time contract was made.

The Federal courts will hold:

"That the rights of parties arising under contracts not involving questions of a Federal nature are to be determined in accordance with the settled principles of local law as maintained by the highest court of the State at the time such rights accrued." *Loeb v. Trustees of Columbia Township*, 179 U. S. 472, 21 Sup. Ct. Rep. 174.

Partial invalidity of statute.

667. (Ohio, 1902.) Though the provision in an enabling act authorizing special assessments to pay bonds may be unconstitutional, the balance of the act held to be valid. *Board of Commissioners v. Gardiner Savings Inst.*, 55 C. C. A. 614, 119 Fed. 36.

B. Laws Impairing Obligation of Contracts; Retroactive Laws.

Withdrawing taxing power.

668. (Ill. 1866.) When the bonds involved in this suit were issued by the city of Quincy, statutes of Illinois in force authorized the levy of a special tax sufficient to pay the coupons in question as they became due. Held, that a subsequently enacted statute so restricting the city's power of taxation as to disable it from paying such indebtedness was in violation of section 10 of article 1, of the Constitution of the United States, which provides that "no State shall pass any law impairing the obligation of contracts."

"When the bonds in question were issued there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the ex-

text of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist. It is well settled that a State may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other.

"The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of

this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract, but an abstract right — of no practical value, — and render the protection of the Constitution a shadow and a delusion." *Von Hoffman v. City of Quincy*, 4 Wall. 535, 18 L. Ed. 403.

Obligations of contract not affected by repeals.

669. (Ill. 1866.) "It is conceded that this act was in force when the bonds in question were issued. If so, it was beyond the power of the legislature to repeal it, so far as it concerns the bonds in question, unless some other adequate remedy were substituted in its place." *City of Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560.

Withdrawal of taxing power impairing obligation of contracts.

670. (Iowa, 1867.) "Where a State has authorized the municipal corporation to contract and to exercise the local power of taxation to the extent necessary to meet the engagement, the power thus given cannot be withdrawn until the contract is satisfied." *Piggs v. Johnson County*, 6 Wall. 166.

When existing remedies preserved, no cause of complaint.

671. (Wis. 1873.) "The remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to the creditor. Thus a statute prohibiting the exercise of its taxing power by the city to raise money for the payment of these bonds would be void. But it is otherwise of statutes which are in existence at the time the debt is contracted. Of these the creditor must take notice, and if all the remedies are preserved to him which were in existence when his debt was contracted he has no cause of complaint." *Rees v. City of Watertown*, 19 Wall. 107, 22 L. Ed. 72.

Contracts cannot be impaired by constitutional provisions.

672. (Ill. 1875.) A contract of subscription to the capital stock of a rail-

road company by Moultrie county, Ill., was entered into in 1869 under existing legal authority, but the bonds of the county in payment of such subscription were not issued until after the new Constitution of Illinois went into effect, July 2, 1870. Held, that the contract of subscription was a binding contract on the parties, and that the obligations of such contract were not affected by the Constitution. "A Constitution can no more impair the obligation of a contract than ordinary legislation can. It must be conceded that, had no subscription been made, or engagement to subscribe entered into, before the new Constitution took effect, none could have been made after." *County of Moultrie v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 331, 33 L. Ed. 631.

Impairing obligation of contract of a city by taxing its own obligations held by nonresident.

673. (S. Car. 1877.) "It is enough for the present case that we hold, as we do, that no municipality of a State can, by its own ordinances, under the guise of taxation, relieve itself from performing to the letter all that it has expressly promised to its creditors.

"There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed." An extended discussion of the subject in the opinion of the court. *Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 760.

Change in form of creditors' remedy.

674. (La. 1880.) On consideration of a statute of Louisiana, which divested the courts of the State of authority to allow any summary process or mandamus against the officers of the city of New Orleans, and pre-

scribed a new course of procedure for the satisfaction of judgment-creditors of the city, held: "Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition. If, therefore, we could see that such would be the effect of the provision of the act of the State, No. 5 of 1870, requiring judgments to be registered with the controller before they are paid, we should not hesitate to declare the provision to be invalid. But we are not able to see anything in the requirement which impedes the collection of the relator's judgments, or prevents his resort to other remedies, if their payment be not obtained. The registry is a convenient means of informing the city authorities of the extent of the judgments, and that they have become executory, to the end that proper steps may be taken for their payment. It does not impair existing remedies." *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. Ed. 132.

Impairing taxing power by legislation.

675. (La. 1880.) State legislation impairing the legal power of a municipality existing at the time of issuing its bonds, to raise by taxation the necessary means for their payment, is prohibited by the Constitution of the United States.

"Legislation producing this latter result, not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the Constitution, and must be disregarded—treated as if never enacted—by all courts recognizing the Constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. So long as the corporation continues in existence, the court has said that the control of the legislature over the power of taxation delegated to it is restrained to cases where such control does not impair the obligation of contracts made upon a pledge, expressly or impliedly given, that the power should be exercised for their fulfillment. However great the

control of the legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts."

"The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the State, and to those of its agents acting under its authority, as well as to contracts between individuals. And that obligation is impaired, in the sense of the Constitution, when the means by which a contract at the time of its execution could be enforced, that is, by which the parties could be obliged to perform it, are rendered less efficacious by legislation operating directly upon those means." *Von Hoffman v. City of Quincy*, 4 Wall. 535, followed; *Meriwether v. Garrett*, 102 U. S. 472, distinguished; *Wolff v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395; *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090.

Power of taxation; laws impairing, unconstitutional.

676. (La. 1880.) In a mandamus proceeding to enforce the levy of a tax to pay a judgment rendered against the city of New Orleans upon railroad-aid bonds, it was urged by the city that, as the act under which the bonds were issued declared that the stock to be issued by the company to the city should remain "forever pledged for the redemption of said bonds," and made no other provision for the ultimate payment of the principal, but it provided that a special tax should be levied each year to pay the annual interest, only stock thus pledged and the income from it were applicable to the payment of the principal of the bonds. Following the decision in *United States v. New Orleans*, 98 U. S. 381, held, "that the indebtedness of the city was conclusively established by the judgments recovered against it, and that their payment was not restricted to any species of property or revenue or subject to any conditions. If there were any limitations upon the means by which payment of the bonds was to be had, they should have been insisted upon when the suits were pending, and have been continued in the judgments. The fact that no such limitations were there found was conclusive that none existed." Held, also, "that if the question were an open

one its conclusion would be the same; that the declaration of the act, that the stock which the city was to receive from the railroad company should remain, 'forever pledged for the redemption of said bonds,' only created a statutory pledge by way of collateral security for their payment, and did not release the city from its primary liability; and that the bondholder was not bound to look to that security, but could proceed directly against the city without regard to it." Held, also, that "it is true that the power of taxation belongs exclusively to the legislative department, and that the legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, subject, however, to this qualification, which attends all State legislation, that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States, and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the Constitution and must be disregarded—treated as if never enacted—by all courts recognizing the Constitution as the paramount law of the land."

"So long as the corporation continues in existence, the court has said that the control of the legislature over the power of taxation delegated to it is restrained to cases where such control does not impair the obligation of contracts made upon a pledge expressly or impliedly given, that the power should be exercised for their fulfillment. However great the control of the legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts." *Wolff v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395.

Statute reducing time for commencement of actions.

677. (Wis. 1881.) "It was undoubtedly within the constitutional power of the legislature to require, as to existing causes of action, that suits

for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect." Held, that a State legislature might lawfully reduce a statute limitation on an existing obligation from twenty years to six years. *Koshkonong v. Burton*, 104 U. S. 638, 26 L. Ed. 886.

Assumption by consolidated city, under legislative authority, of the debts of constituent municipalities; subsequent legislation impairing taxing power.

678. (La. 1881.) "The acts of 1852 consolidated the three previously existing municipalities within the limits of New Orleans into one, and added to it the adjacent city of Lafayette. The new corporation took all the property and interests of the municipalities, and of Lafayette, and consequently became subject to their obligations. The advantages which accrued from the possession of their property were accompanied with the burdens of their debts. This liability was not, however, left to rest upon any general principles of corporate liability in such cases. The legislature recognized its existence, and in consolidating the municipalities and the corporation of Lafayette, declared that the debts of the old corporation, of the municipalities, and of that city, should be assumed and paid by the city of New Orleans, which was declared to be liable therefor. The first of the acts appointed commissioners of the debt thus consolidated, and authorized them to issue new bonds of the city having forty years to run, with interest coupons payable semi-annually in exchange for the obligations and debts of the old corporation and of the municipalities, to which the debts of Lafayette were subsequently added by the supplementary act. To meet the interest it provided that the common council of the city should annually, in the month of January, pass an ordinance to raise the sum of \$600,000, increased to \$850,000 by the supplementary act, by a special tax

on real estate and slaves, to be called the consolidated loan tax. It also provided that any surplus remaining at the end of each year, after payment of the interest on these bonds, and the expenses of managing the debt, should be applied to the purchase of such of the bonds as might have the shortest period to run. These provisions, until the bonds were accepted, were in the nature of proposals to the creditors of the old city, of the municipalities, and of Lafayette. The State in effect said to them: The city will give these bonds, running for the period designated, and drawing interest, in exchange for your demands; and as security for the payment of interest, and the gradual redemption of the principal, the city shall annually, in January, levy a special tax for that purpose to the amount of \$650,000. The provisions were designed to give value to the proposed bonds in the markets of the country, and necessarily operated as an inducement to the creditors to take them. When the bonds were issued and taken by the creditors, a contract was consummated between them and the city as fully as if all the provisions had been embodied as express stipulations in the most formal instrument signed by the parties. On the one hand, the creditors surrendered their debts against the former municipalities; and, on the other hand, in consideration of the surrender, the city gave to them its bonds, which carried the pledge of an annual tax of a specified amount for the payment of interest on them, and ultimately of the principal. The annual tax was the security offered to the creditors; and it could not be afterwards severed from the contract without violating its stipulations, any more than a mortgage executed as security for a note given for a loan could be subsequently repudiated as forming no part of the transaction. Nearly all legislative contracts are made in a similar way. The law authorizes certain bonds to be issued, or certain work to be done upon specified conditions. When these are accepted, a contract is entered into imposing the duties and creating the liabilities of the most carefully drawn instrument embodying the provisions. *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Hartman v. Greenhow*, 102 U. S. 672; *People v.*

Bond, 10 Cal. 563; *Brooklyn Park Co. v. Armstrong*, 45 N. Y. 235." *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090.

Change in rule of decision of state courts; not allowed to affect contracts.

679. (La. 1881.) "The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes part of the law as much as if embodied in it. So far does this doctrine extend that when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State, and enforced in accordance with it in all cases arising under it. *Christy v. Pidgeon*, 4 Wall. 196, and *Shelby v. Guy*, 11 Wheat. 361. The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts. The doctrine on this subject is aptly and forcibly stated by the chief justice in the recent case of *Douglas v. County of Pike*, 101 U. S. 677, 687. 'The true rule,' he observes, 'is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.' See also *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Havemeyer v. Iowa County*, 3 id. 294; *Thompson v. Lee County*, id. 327; *Lee County v. Rogers*,

7 id. 181; *Chicago v. Sheldon*, 9 id. 50; *Olcott v. The Supervisors*, 16 id. 678; *Fairfield v. County of Gallatine*, 100 U. S. 47." *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090.

Impairment of creditors' remedies unconstitutional.

680. (La. 1881.) "The inhibition upon the courts of the State to issue a mandamus for the levy of a tax for the payment of interest or principal of any bonds except those issued under the premium bond plan was a clear impairment of the means for the enforcement of the contract with the holders of the consolidated bonds. When the contract was made, the writ was the usual and the only effective means to compel the city authorities to do their duty in the premises, in case of their failure to provide in other ways the required funds. There was no other complete and adequate remedy. The only ground on which a change of remedy existing when a contract was made is permissible without impairment of the contract is, that a new and adequate and efficacious remedy be substituted for that which is superseded. Here no remedy whatever is substituted for that of mandamus. The holders are denied all remedy. *Louisiana v. New Orleans*, 102 U. S. 203-207.

"Legislation of a State thus impairing the obligation of contracts made under its authority is null and void, and the courts in enforcing the contracts will pursue the same course and apply the same remedies as though such invalid legislation had never existed. The act of March, 1876, cannot, therefore, be permitted to restrict the power of the city authorities to levy the tax stipulated by the act of 1852, to pay the interest on the consolidated bonds issued thereunder, and to retire the bonds." *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090.

Impairing obligation of contract; conferring judicial powers on executive officer.

681. (Mo. 1884.) In an action on bonds of Jasper county, issued in payment of a subscription to the capital stock of a railroad company, it was argued that a law of Missouri providing for registration of county bonds impaired the obligation of the con-

tract of subscription made by the county with the railroad company, before the act was passed, and the act was for that reason in violation of article 1, section 10, of the Constitution of United States, and that its operation was retrospective and that it therefor contravened section 28 of article 1 of the Constitution of Missouri, that no ex post facto law, or law impairing the obligations of contracts or retrospective in its operation can be passed. Held, following the ruling in *Anthony v. Jasper County*, 101 U. S. 693, that the requirement of said act did not change in any way the contract with the railroad company; that the act changed nothing but the form of the execution of the bonds. Held, also, that said act did not contravene the Constitution of Missouri on the alleged ground that it delegated the exercise of a judicial power to an executive officer of the State. *Hoff v. Jasper County*, 110 U. S. 53, 3 Sup. Ct. Rep. 476, 28 L. Ed. 68.

Legislation changing rate of tax applicable to payment of judgment; whether judgment founded on contract material.

682. (La. 1884.) "In the case of *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, we held that the right to reimbursement for damages caused by a mob or riotous assemblage of people in that city, was not founded upon any contract between the corporation and the parties injured; that its liability for the damages was created by law, and could be withdrawn or limited at the pleasure of the legislature; that its creation was merely a measure of policy and its character was not changed by the fact that the amount of damage sustained in any particular case was ascertained and established by a judgment in favor of the sufferer. So when the question arose as to the validity of legislation changing the rate of taxation by which funds could be obtained to meet a judgment in such case, the court looked beyond the judgment to the causes upon which it was founded. As the contract clause of the Constitution was intended to secure the observance of good faith in the stipulation of parties against State action, it could not be invoked when no such stipulation existed, and therefore not against

legislation which interfered merely with the enforcement of claims for damages from the violence of mobs or of judgments upon such claims."

"Whether such repeal was effectual to deprive him of the process prayed, depended upon the question whether the judgment was founded upon a contract, the obligation of which the State was prohibited from impairing. By the obligation of a contract is meant the means which, at the time of its creation, the law affords for its enforcement. The usual mode by which municipal bodies obtain the funds to meet their pecuniary engagements is taxation. Accordingly, when a contract is made upon the faith that taxes will be levied, legislation repealing or modifying the taxing power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy, is within the constitutional inhibition." *Louisiana ex rel. Nelson v. Police Jury of St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. Rep. 648, 28 L. Ed. 574.

Legislation providing additional taxes after bonds issued, not unconstitutional.

683. (Mo. 1886.) "In behalf of the plaintiffs in error it is contended that, as the act of 1868 only required a tax to be levied on real estate, it was beyond the power of the legislature by subsequent enactment, after the bonds were issued, to subject any property other than real estate to taxation for the purpose of meeting this liability of the township. Such legislation, it is claimed, is in violation of the prohibition, found in both the National and State Constitutions, of laws impairing the obligations of contracts. This position cannot be maintained. There was not, within the meaning of such prohibition, any contract between the State and the township in respect either of the subscription which the latter voted, or of the bonds issued in its behalf. The township being a part of the civil government of the State established for public purposes, the powers conferred upon it were at all times subject to legislative control or modification—at least to such as was not inconsistent with the contract rights of third parties." *Cape Girardeau County Court v. Hill*, 118 U. S. 68, 6 Sup. Ct. Rep. 961, 30 L. Ed. 73.

Constitutional provision aimed at state legislature, not courts.

684. (La. 1888.) "In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals."

By-law or ordinance may violate this provision.

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States."

An extended discussion of the subject and a large number of cases cited and examined in the opinion. *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 8 Sup. Ct. Rep. 741, 31 L. Ed. 763.

Impairment of creditors' remedy.

685. (Ark. 1893.) "In the case under consideration the State statute relied on to defeat the jurisdiction of the United States Circuit Court was passed after the bonds sued on were issued and put in circulation, and if its requirement of 'presenting the bonds to the County Court of Chicot county 'for allowance or rejection' was binding upon citizens of other States holding such bonds, it would present a very grave question whether it was not such a substantial and material change in the remedy in force when the contract was made, as to impair its obligations." *Chicot County v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. Rep. 695, 37 L. Ed. 546.

County bond a contract of county only; not of electors and taxpayers.

686. (Kan. 1898.) In an action on interest coupons from county refunding bonds, issued by the board of

county commissioners of Haskell county, it was urged against the validity of the bonds that the issue by the board without a vote of the electors of the county of the refunding bonds which would not fall due until 1918, in exchange for bonds due in 1909, impaired the obligations of contracts by which the electors of the county were bound by their vote in favor of the issue of the latter. Held, that this claim was unsound; that a county bond issued by the board of county commissioners is a contract of the county only and not of the voters and taxpayers. *Board of Comrs. of Haskell County, Kan., v. National Life Ins. Co. of Montpelier, Vt.*, 32 C. C. A. 591, 90 Fed. 228.

Refunding, without vote, bonds previously issued on vote of taxpayers.

687. (Kan. 1898.) The refunding by the commissioners of a county of bonds previously issued by the commissioners of such county whose terms were fixed by a petition of taxpayers or vote of the electors of the county, by issuing in exchange therefor, other bonds bearing different terms and time of payment without a vote of the electors is not a violation of the constitutional provision prohibiting the impairment of the obligations of the contract of the taxpayers and electors of the county, as such bonds are the contracts of the county only and not of the taxpayers or electors.

A debt of a county in Kansas, evidenced by a judgment against the county, may be refunded by the issuance of bonds therefor, without first submitting the question to a vote of the electors under the act of March 8, 1879. *Board of Comrs. of Pratt County, Kan., v. Society for Savings*, 90 Fed. 233, 32 C. C. A. 596.

Retroactive statutes not unconstitutional when in furtherance of justice by fulfillment of moral obligation.

688. (Ohio, 1901.) Cuyahoga county,

Ohio, issued its bonds to pay for an armory building to be owned by the county, but to be used jointly by the county and the State, by authority of an act thereafter held to be unconstitutional. The building was erected and enjoyed by the county. Subsequently by a statute general in form the commissioners of the county were authorized, if they deemed it for the best interest of the county, to fulfill the moral obligation of the county to reimburse the holders of the bonds issued under the circumstances named by the issuance of new bonds; and the holders of the bonds so previously issued were by the statute given a right of action against the county in case the county commissioners refused after demand to so reimburse them.

In an action against the county under said statute it was urged that the statute violated section 28 of article 2 of the Constitution of Ohio, because retroactive in its effect.

"The conclusion that the act was retroactive is based upon the theory that, there having been no vested right at the time it was passed to recover the money loaned, the legislature created a liability upon a transaction which had been already closed and in which no liability had been incurred by the county. But this, we think, is a misconception of the purpose of the act, as well as of the nature of the facts upon which it proceeded. It was not intended to declare that the past transaction created a contract or imposed any legal liability, but that a moral obligation had arisen, which it was then incumbent upon the legislature to provide the means to discharge by the exercise of its power of taxation. The power of the legislature to raise taxes to meet obligations, whether legal or moral only, is not restricted to such obligations as shall be thereafter incurred. It is not questioned that the legislature of Ohio has, in some circumstances, at least, the power to recognize and provide for the discharge of obligations

binding only in conscience and honor. This has always been admitted by the highest court of the State. In the nature of things, the moving facts must have already occurred. Otherwise, there could be no recognition or any estimate of the particular merits of the claim, or the measure of relief which justice would require. A statute of this kind, enacted for the purpose of providing for future transactions, would be an anomaly. To deny the power of recognition of a moral obligation because it rests upon past transactions is to deny it altogether."

"The reasoning upon which the court below reached the conclusion that this statute was retroactive, within the meaning of the Constitution of Ohio, is based upon the idea that it created a new right, and vested the holders of the bonds with a cause of action which had no previous existence. But this, as we have seen, is not the holding of the Supreme Court of Ohio, which disclaims any such ground for supporting the recognition of a claim, and founds it upon the public duty which the legislature is required to discharge without regard to the question whether the claim is cognizable by a court of justice or not. And this holding is undoubtedly in accord with the doctrine which generally, if not universally, prevails."

"If the legislature has power to recognize a moral obligation of the State, it has power to recognize a moral obligation of a county. Confessedly, there is no other depository of such power. The legislature judges for it what moral obligations it should satisfy. It is its representative for that purpose; and, having determined the obligation to exist, it is manifest that the levy to satisfy it must be made upon the county, and, further, that the purpose is a local one. *State v. Hoffman*, 35 Ohio St. 435, 444. Beyond question, the legislature may compel a county to pay a legal obligation. Upon the same authority, it may compel it to pay one which it is bound only in good conscience and

honor to pay. It is inadmissible to revert to the proposition that the claim was originally invalid in point of law. That has become immaterial."

An extended discussion and a number of cases cited in the opinion.

Obligations of contracts not thereby impaired.

"It is also contended that the statute is obnoxious to section 10 of article 1 of the Constitution of United States, which prohibits legislation impairing the obligation of contracts. But this assumes a contract which is legally valid, and the county denies the existence of any such contract. The legislature conceded this, and imposes the duty upon other grounds, which it is empowered to take notice of for the purpose of determining whether, independently of the existence of a contract, a moral obligation rests upon the county. Moreover, the county, being a mere governmental agency of the State, its contracts for public purposes, so long as they remain unperformed, are, as between the county and the State, subject to the control of the legislature. The county has no vested right in such case which it can oppose to the paramount authority." *New York Life Ins. Co. v. Board of Comrs. of Cuyahoga County, Ohio*, 106 Fed. 123.

Impairing power to tax.

689. (S. Car. 1901.) "The purpose of the general assembly in passing the act to amend the charter of the Greenville & Port Royal Railroad Company, approved December 24, 1885 (19 St. at Large, S. C., p. 237), was to promote the construction of that road. To accomplish this it authorized and encouraged townships along the proposed line of road to subscribe bonds toward this construction. In order to give character and credit to these bonds, and to induce the public to invest in them, the ninth section of the act provides a careful, full, and sure mode of providing for the interest. And an amendment to the

same charter made in 1887 (19 St. at Large, S. C., p. 921), provided in the same way for the payment of the principal by taxation. These provisions of the act went into, and formed a part of, the contract moving to the bondholders who invested their money trusting to the provisions. The contract could not be impaired by any subsequent act on the part of the State of South Carolina."

"Where at the time of issuing said bonds there existed an act authorizing an annual tax for their payment, it was beyond the power of the legislature to repeal it, so far as concerned the bonds in question, unless some other adequate remedy was substituted in its place."

"The Supreme Court of the United States deals with the provisions of statutes like this as creating a trust which the State, the donor, cannot annul, and which the officers to whom the power is given are bound to execute. So neither the State nor the corporation can any more impair the obligation of the contract by repeal of the act than they can in any other way." Hicks County Auditor, et al., v. Cleveland, 106 Fed. 459; Padgett, et al., v. Post, id, 600.

Obligation of contracts, State may not impair by constitutional or statutory provisions.

690. (S. Car. 1905.) In 1895 the holder of bonds, theretofore issued by township Ninety-six, obtained judgment against the township on such bonds.

"In 1895 South Carolina adopted a new Constitution, by which it was provided that the several townships of the State, with names and boundaries as then established, should continue, with power, however, in the legislature, to form other townships or change the boundaries of those established Article VII. This section, by an amendment finally adopted in 1903, was made inapplicable to certain townships, including Ninety-six. It was provided that 'the corporate

existence of the said townships be, and the same is, hereby destroyed, and all offices in said townships are abolished and all corporate agents removed.' 24 Stat. S. Car. (1903), 3.

"At the time of the execution of the bonds township Ninety-six was situated in Abbeville county, and in 1896 the county of Greenwood was organized out of portions of Abbeville and Edgefield counties, and township Ninety-six was included in Greenwood county.

"The officers of the latter county refused to assess and collect the taxes, contending that they are not officers of the county, but officers of the State, appointed by the governor of the State, and are termed county officers because assigned to duty in that county, but cannot exercise any function of those officers except as authorized by the laws of the State, and that they have been forbidden by an act of the general assembly of the State to assess or collect taxes for the payment of subscriptions by townships to the building of roads which have not been built. 23 Stat. S. Car. 1899), 78."

Held: "The power of the State to alter or destroy its corporations is not greater than the power of the State to repeal its legislation. Exercise of the latter power has been repeatedly held to be ineffectual to impair the obligation of a contract. The repeal of a law may be more readily undertaken than the abolition of townships or the change of their boundaries or the boundaries of counties. The latter may put on the form of a different purpose than the violation of a contract. But courts cannot permit themselves to be deceived. They will not inquire too closely into the motives of the State, but they will not ignore the effect of its action. The cases illustrate this. There may indeed be a limitation upon the power of the court. This was seen and expressed in *Heine v. Levee Commission*, and *Meriweather v. Garrett*, *supra*. There is no limitation in the case at bar. A tax has

been provided for and there are officers whose duty it is to assess and collect it. A court is within the line of its duty and powers when it directs those officers to the performance of their duty; and their objects upon which the tax can be laid. It is the property within the boundaries of the territory that constituted township Ninety-six." *Graham, County Auditor for Greenwood County, v. Folsom*, 200 U. S. 248, 26 Sup. Ct. Rep. 245, — L. Ed. —.

Constitutional amendment not retroactive, when.

691. (N. C. 1904.) "The Supreme Court of the United States has held that a change in a State Constitution, relating to municipal subscriptions, is not retroactive so as to have any controlling application to laws in existence when the Constitution was adopted. It does not destroy a vested right of a corporation to receive bonds of a municipal corporation, although they are not issued. *Dallas Co. v. McKenzie*, 110 U. S. 686, 4 Sup. Ct. 184, 28 L. Ed. 285; *County of Ray v. Vansycle*, 96 U. S. 675, 24 L. Ed. 800; *County of Schuyler v. Thomas*, 98 U. S. 169, 25 L. Ed. 88." Board of Comrs. of *Henderson Co. v. Travelers Ins. Co.*, 63 C. C. A. 467, 128 Fed. 817.

Change in Constitution and law of State, by which townships are abolished and system of county government changed, not allowed to defeat collection of township bonds previously issued.

692. (S. Car. 1905.) Township Ninety-six of Abbeville county, South Carolina, in 1886, issued its railroad aid bonds. In 1897 Greenwood county was formed from parts of Abbeville and Edgefield counties, including the territory of township Ninety-six.

In 1903 the Constitution of the State was so amended as to provide that the corporate existence of township Ninety-six should be abolished and its corporate agents and officers removed.

This action was prosecuted to ob-

tain a nominal judgment against Greenwood county to be paid by a tax upon the property within the territory of said township Ninety-six.

Speaking of the law under whose authority the bonds were issued, the court says: "The several provisions of this act are in the nature of a remedy afforded to the bondholders to enable them to contract with the people of the territory embraced in Ninety-six township and to provide the means by which the people of that territory should issue and deliver the bonds in the event it should be decided by popular vote to subscribe the amounts for the construction of the railroad which has been submitted to them for their consideration. The provisions which constituted the county commissioners of such county the corporate agents of the township of Ninety-six were not only intended to afford the bondholders the means by which the bonds should be issued and delivered, but they were necessarily intended to afford a remedy or a means by and through which the bondholders, in the event of default of payment, could proceed against the people of that territory for the enforcement of the obligations which they assumed at the time the bonds were issued and delivered. These provisions became a part of the contract between the township of Ninety-six and the bondholders, and any legislative or constitutional enactment which undertakes to deprive the bondholders of the remedies which were thus afforded them without providing other remedies equally as efficacious is an impairment of the obligations of a contract, and therefore unconstitutional."

"When the territorial division of Ninety-six township was transferred from the county of Abbeville to that of Greenwood, the status of the people of that territory was not changed in so far as their relation to the bondholders was concerned; and, when such territory became a part of Greenwood county, that county eo instante assumed the same relation to the people

of the newly acquired territory as the county from whence they came had sustained by virtue of the statute which authorized the issuance of the obligations upon which this suit is brought."

"The fact that the system of county government in that State has been radically changed cannot relieve the people of Ninety-six township from the payment of the obligation thus assumed, nor the county of Greenwood from the obligation which originally rested on the county of Abbeville, to wit, from acting as the trustee of the township against whom suit could be instituted for the purpose of obtaining a nominal judgment, to be ultimately discharged by the assessment and collection of a sufficient tax by the auditor and county treasurer on the property of the people of such territory for the payment of any judgment which might be thus obtained.

"If the payment of obligations could be avoided by constitutional or legislative enactment, it would leave the holders of such securities without a remedy; the credit of public corporations, such as cities, counties and towns, would be destroyed, and the people of such communities would be unable to secure funds with which to make the improvements necessary to keep abreast with the industrial development of the country." *Folsom v. Greenwood County*, 137 Fed. 449, 69 C. C. A. 473.

Impairing obligation of contract by changing remedy.

693. (Iowa, 1906.) "The act of 1888 undoubtedly placed a restriction upon the exercise of an existing right of alienation, made it less valuable, because it cut down one of its most valuable incidents, and if, as said by Mr. Justice Field in *Cromwell v. County of Sac*, supra, the holder's 'title and right would be impaired if any restrictions were placed upon his power of disposition,' surely Mrs. Mason's title and right were impaired by the

statute, which so materially affected the salable value of her bond. If the act of 1888 was intended to affect the remedy only, and thereby to escape constitutional condemnation, it was equally ineffective to destroy such a right as Mrs. Spafford possessed to bond No. 43 at the time of its passage.

"No change of remedy, so called, can impair an existing substantial right fixed by contract." *Gamble v. Rural Independent School District of Allison, et al.*, 76 C. C. A. 539, 146 Fed. 113.

Obligation of contract impaired; effect of recitals of law in bonds.

694. (Kan. 1911.) In 1886, by authority of an act of 1876, Kansas, Clark county subscribed for stock of a railroad company, agreeing to pay for same in bonds of the county, bearing interest at six per cent. per annum, and payable in thirty years from their date. The bonds were issued to the railroad company on April 10, 1889. In 1887 an act was passed providing that any county in that State might redeem its bonds thereafter issued to railroad companies at any time after ten years from the date of their issue. In August, 1901, the county gave notice that it would pay said bonds on October 10, 1901, at a designated place and that the bonds would cease to bear interest at that date. In an action at law by a bona fide holder of these bonds on interest coupons the county alleged in defense its assumed right to redeem the bonds under the act of 1887 and its notice of intention to redeem and urged that interest ceased from October 10, 1901. The bonds recited in effect that they were issued by authority of said act of 1876 and the amendatory act of 1887.

"(1) But the contract had been made, and the rights of the county and the railroad company had vested before that act was passed, the county had agreed to take the stock and to pay the company for it with interest-bearing bonds payable thirty years

from their date, the railroad company had acquired the obligation of the county to deliver these bonds to it on its completion of the railroad and the county had secured the obligation of the company to deliver to the county its stock. If the act of 1887 is applicable to the bonds here in controversy it necessarily impairs this contract obligation of the county in violation of article 1, section 10, of the Constitution and it is void, for it releases the county from its agreement to pay interest on these bonds at six per cent. per annum from October 10, 1901, until October 10, 1919. *Bedford v. Eastern Building & Loan Association*, 181 U. S. 227, 240, 241, 21 Sup. Ct. 597, 45 L. Ed. 834; *Barnitz v. Beverly*, 163 U. S. 118, 130, 16 Sup. Ct. 1042, 41 L. Ed. 93. If the act of 1887 is inapplicable to these bonds the agreement to pay this interest stands unimpaired, so that in either case the county is legally bound to pay the interest.

"(2) The contention of counsel for the county that the act of 1887 is amendatory of and supplemental to the act of 1876, and that, because the railroad company accepted the bonds which recited that the subscription to stock and the issue of the bonds was made 'by virtue of and in full conformity and compliance with the authority conferred' by the act of the

legislature of Kansas of 1876, 'and by acts of said legislature amendatory thereof and supplemental thereto,' it and the plaintiff waived and are estopped from maintaining their claim to the interest on the bonds between October 10, 1901, and October 10, 1919, which by the plain terms of the bonds the county bound itself to pay, has not escaped thoughtful consideration. But it cannot prevail (1) because the express stipulation of the bonds upon which the company and the plaintiff had the right to rely is in direct conflict with the position this contention takes and it estops the county from maintaining it, (2) because the recital is not that the bonds were issued in conformity with or subject to the terms of the acts supplemental to and amendatory of the act of 1876, but that they were issued 'by virtue of and in compliance with the authority conferred' by the act of 1876 and the acts amendatory thereof and supplemental thereto, and this recital could not have had reference to the act of 1887 because that act conferred no such authority and (3) because the act of 1887 was neither amendatory of the act of 1876 nor supplemental thereto, but was a separate and independent law." *Board of Commissioners of Clark County Kan., v. Woodbury*, 109 C. C. A. 244, 187 Fed. 412.

C. Due Process of Law; Equal Protection of the Laws.

"Due process of law;" not necessarily judicial proceedings.

695. (La. 1877.) The phrase "due process of law," as used in the Fourteenth Amendment to the Constitution of the United States does not mean by a judicial proceeding as applied to the collection of taxes.

"The nation from whom we inherit the phrase 'due process of law' has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation."

Opportunity to be present.

"It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the States now have boards of revisers of tax assessments does not prove that taxes levied without them are void."

Injunction against illegal tax.

"Nor is a person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that State, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party, and recover back the money as paid under duress, if the tax was illegal. But however that may be, it is quite certain that he can, if he is wrongfully taxed, stay the proceeding for its collection by process of injunction. See Fouqua's Code of Practice of Louisiana, arts. 296-309, inclusive. The act of 1874 recognizes this right to an injunction, and regulates the proceedings when issued to stay the collection of taxes. It declares that they shall be treated by the courts as preferred cases, and imposes a double tax upon a dissolution of the injunction."

Injunction bond.

"But it is said that this is not due course of law, because the judge granting the injunction is required to take security of the applicant, and that no remedial process can be within the meaning of the Constitution which re-

quires such a bond as a condition precedent to its issue."

"It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another." *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335.

Due process of law; history, definition.

696. (La. 1877.) "The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment, in the year 1866.

"The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land' in the great charter, in connection with the writ of habeas corpus, the trial by jury, and other guaranties of the rights of the subject against the oppression of the crown. In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the States as further limitations upon the power of the Federal government, it is found in the fifth, in connection with other guaranties of personal rights of the same character. Among these are protection against prosecutions for crimes, unless sanctioned by a grand jury; against being twice tried for the same offense; against the accused being compelled, in a criminal case, to testify against himself; and against taking private property for public use without just compensation.

"Most of these provisions, including the one under consideration, either in terms or in substance, have been embodied in the Constitutions of the several States, and in one shape or an-

other have been the subject of judicial construction. It must be confessed, however, that the constitutional meaning or value of the phrase 'due process of law,' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guaranties of personal rights found in the Constitution of the several States and of the United States.

"It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no State shall deprive any person of life, liberty, or property without due process of law,' can a State make anything due process of law which, by its own legislation, it chooses to declare such?

"To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."

Referring to this phrase as found in the Fifth and Fourteenth Amendments to the Constitution of United States, the court say:

"It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and

subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.

"But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the Federal government, or limitations imposed upon the States.

"As contributing, to some extent, to this mode of determining what class of cases do not fall within its

provision, we lay down the following proposition, as applicable to the case before us: That whenever by the laws of a State, or by a State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provided for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

"It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the Fourteenth Amendment was adopted, the provision on that subject in immediate juxtaposition in the Fifth Amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in *Loan Assn. v. Topeka* (20 Wall. 655). But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. This was clearly stated by this court, speaking by the chief justice, in *Kenard v. Morgan* (92 U. S. 480), and, in substance, repeated at the present term, in *McMillan v. Anderson* (95 id. 37)."

Levying assessment before work done.

It is not a denial of due process of law that the assessment upon property to pay the cost of an improvement was made before, instead of after, the work was done.

Opportunity to be heard before assessment becomes effectual.

"Before the assessment could be collected, or become effectual, the statute required that the tableau of assessments should be filed in the proper District Court of the State; that personal service of notice, with reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown, or could not be found. This was complied with; and the party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution."

Repeated assessments not forbidden.

"It is said that the plaintiff's property had previously been assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this, or which forbids unequal taxation by the States. If the act under which the former assessment was made is relied on as a contract against further assessments for the same purpose, we concur with the Supreme Court of Louisiana in being unable to discover such a contract."

That property assessed was not benefited.

"It is also said that part of the property of plaintiff which was assessed is not benefited by the improvement. This is a matter of detail with which this court cannot interfere, if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds."

Personal judgment for assessments.

Rendering personal judgment for assessments levied for public improvements violates no provision of the Federal Constitution. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616.

Special assessments not invalid because onerous or because made by foot frontage.

697. (D. C. 1878.) "It may be that the burden laid upon the property of the complainants is onerous. Special assessments for special road or street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area, or market value of the adjoining property, at its discretion, is, under the decisions, no longer an open question." *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098.

Taxation, when not unconstitutional.

698. (Ala. 1880.) The issue by the president and commissioners of revenue of Mobile county of bonds for the improvement of the river, bay, and harbor of Mobile under the act of February 16, 1876, of the legislature of Alabama, was not a taking of private property for public use within the meaning of the constitutional clause.

"It was a loan of the credit of the county for a work public in its character, designed to be of general benefit to the State, but more especially and immediately to the county. The expenses of the work were of course to be ultimately defrayed by taxation upon the property and people of the county. But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution. Taxation only exacts a contribution from individuals of the State or of a particular district, for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure. But when private property is taken for public use, the owner receives full compensation. The taking differs from a sale by him only in that the transfer of title may be compelled, and the amount of compensation be determined by a jury or officers of the government appointed for that purpose. In the one case, the party bears only a share of the public burdens; in the other, he exchanges his property for its equivalent in money. The two things are essentially different."

Taxation is in legislative discretion.

"Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State especially and immediately benefited by the expenditure."

Taxation not unconstitutional because oppressive.

"It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement, which was to benefit the whole State, among all its counties. But this court is not the harbor, in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive State legislation. The judicial power of the Federal government can only be invoked when some right under the Constitution, laws, or treaties, of the United States is invaded. In all other cases, the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests." *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238.

State legislature may determine what property specially benefited by an improvement; extent of power to tax.

699. (N. Y. 1888.) "The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily con-

clusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881, the legislature imposes the unpaid portion of the cost, and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final. We can see in the determination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power. That power of taxation is unlimited except that it must be exercised for public purposes."

"The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion."

"In the absence of any more specific constitutional restriction than

the general prohibition against taking property without due process of law, the legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if he sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. When the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited." An extended discussion of the subject and numerous cases cited in the opinion. *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. Rep. 921, 31 L. Ed. 763.

Special assessments; due process of law; equal protection of the laws.

700. (Ky. 1888.) Owners of property in Louisville, Ky., which had been subjected to special assessments to pay the cost of street improvements, contended that the act of the general assembly under which the improvements and assessments were made, so far as it authorized the cost of the improvements to be assessed against the owners of lots and gave a lien thereon, and all proceedings thereunder were in conflict with section 1 of article 14 of the amendments of the Constitution of the United States, as amounting to a deprivation of property without due process of law, and a denial of the equal protection of the laws.

"In *Davidson v. New Orleans*, 96 U. S. 97, 104, it was held by this court, Mr. Justice Miller delivering the opinion, 'that whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. * * * It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice according to the modes of proceeding applicable to such a case.' And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, or that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount, assessed, are matters in which the State authorities are controlled by the Federal Constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power. *Spencer v. Merchant*, 125 U. S. 345; *Stanley v. Supervisors*, 121 U. S. 535, 550; *Mobile v. Kimball*, 102 U. S. 691; *Hagaar v. Reclamation District No. 108*, 111 U. S. 701; *United States v. Memphis*, 97 U. S. 284; *Laramie County v. Albany County*, 92 U. S. 307. And whenever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied. *Wurts v. Hoagland*, 114 U. S. 606; *Railroad Company v. Richmond*, 96 U. S. 521, 529. The remedy for abuse is in the State courts, for, in the language of Mr. Justice Field, in

Mobile v. Kimball, 'this court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive State legislation.'" *Walston v. Nevin*; *Roach v. Nevin*, 128 U. S. 578, 9 Sup. Ct. Rep. 192, 32 L. Ed. 544.

Statute providing for widening a street within a defined district.

701. (Cal. 1891.) The act under consideration in this case was held to provide "due process of law" within the meaning of the Fourteenth Amendment to the Constitution of the United States. It provided for widening a street and making special assessments upon property within the district to meet the cost of the work, defined the district benefited by the improvement, contained provisions for notices to owners and for hearings by them concerning such assessments. A number of cases decided in the Supreme Court involving "due process of law" noticed and discussed.

The manner of administering such act did not involve question of "due process of law."

"But errors in the mere administration of the statute, not involving jurisdiction of the subject and of the parties, could not justify this court, in its re-examination of the judgment of the State court, upon writ of error, to hold that the State had deprived, or was about to deprive, the plaintiffs of their property without due process of law. Whether it was expedient to widen Dupont Street, or whether the board of supervisors should have so declared, or whether the board of commissioners properly apportioned the costs of the work or correctly estimated the benefits accruing to the different owners of property affected by the widening of the street, or whether the board's incidental expenses in executing the statute were too great or whether a larger amount of bonds were issued than should have been, the excess, if any, not being so great as to indicate upon the face of the transaction a palpable and gross departure from the requirements of the statute, or whether upon the facts disclosed the report of the commissioners should have been confirmed, are, none of them, issues presenting Federal questions and the judgment of the State

court, upon them, cannot be reviewed here." *Lent v. Tillson*, 140 U. S. 316, 11 Sup. Ct. Rep. 825, 35 L. Ed. 419.

Due process of law; equal protection of the laws.

702 (La. 1896.) As the Constitution and laws of Louisiana permit the taking, damaging, and destruction of private property for the purpose of building public levees without compensation as an exercise of the police power of the State, and as the plaintiff in error, who was not a citizen of Louisiana, received the same measure of right under the Constitution and laws of Louisiana as that awarded to its citizens, he was not deprived of his property without due process of law, or denied the equal protection of the laws in the light of the Federal Constitution. *Eldridge v. Trezevant*, 160 U. S. 452, 16 Sup. Ct. Rep. 345, 40 L. Ed. 490.

Laws in conflict with federal constitution or statutes.

703. (Cal. 1896.) "If the act of the State legislature as construed by its highest court conflicts with the Federal Constitution or with any valid act of Congress, it is the duty of the Circuit Court and of this court to so decide, and to thus enforce the provisions of the Federal Constitution."

State courts' construction of state constitution and laws, when followed.

"We should not be justified in holding the act to be in violation of the State Constitution in the face of clear and repeated decisions of the highest court of the State to the contrary, under the pretext that we were deciding principles of general constitutional law."

"We are, therefore, practically confined in this case to the inquiry whether the act in question, as it has been construed by the State courts, violates the Federal Constitution."

Intent of fourteenth amendment.

"It never was intended that the court should, as the effect of the amendment, be transformed into a court of appeal where all decisions of State courts involving merely questions of general justice and equitable considerations in the taking of property should be submitted to this court for its determination. The final juris-

diction of the courts of the States would thereby be enormously reduced and a corresponding increase in the jurisdiction of this court would result, and it would be a great misfortune in each case. *Mobile County v. Kimball*, 102 U. S. 691, 704; *Missouri Pacific Railway v. Humes*, 115 U. S. 512, 520. We reiterate the statement made in *Davidson v. New Orleans*, supra, that, 'whenever by the laws of the State or by State authority a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.'

Fourteenth and fifth amendments to the Federal constitution distinguished.

"There is no specific prohibition in the Federal Constitution which acts upon the States in regard to their taking private property for any but a public use. The Fifth Amendment which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the Federal government, as has many times been decided. *Spies v. Illinois*, 123 U. S. 131; *Thorington v. Montgomery*, 147 U. S. 490. In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the State is confined to its depriving any person of life, liberty or property, without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under State authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is

under the authority of the State instead of the Federal government."

Assessments under irrigation laws.

"Is this assessment, for the non-payment of which the land of the plaintiff was to be sold, levied for a public purpose? The question has, in substance, been answered in the affirmative by the people of California, and by the legislative and judicial branches of the State government."

After noticing some provisions of the Constitution of California, the court say:

"The Supreme Court of California has held in a number of cases that the Irrigation Act is in accordance with the State Constitution, and that it does not deprive the landowners of any property without due process of law; that the use of the water for irrigating purposes under the provisions of the act is a public use, and the corporations organized by virtue of the act for the purpose of irrigation are public municipal corporations organized for the promotion of the prosperity and welfare of the people."

"We do not assume that these various statements, constitutional and legislative, together with the decisions of the State court, are conclusive and binding upon this court upon the question as to what is due process of law, and, as incident thereto, what is a public use. As here presented these are questions which also arise under the Federal Constitution, and we must decide them in accordance with our views of constitutional law."

Right to hearing on assessments.

"The legislature not having itself described the district, has not decided that any particular land would or could possibly be benefited as described, and, therefore, it would be necessary to give a hearing at some time to those interested upon the question of fact whether or not the land of any owner which was intended to be included would be benefited by the irrigation proposed. If such a hearing were provided for by the act, the decision of the tribunal thereby created would be sufficient."

"The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land in-

cluded in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e., the amount of the tax which he is to pay. *Paulsen v. Portland*, 149 U. S. 30, 41. But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in *Spencer v. Merchant*, 125 U. S. 345, 356, and *Walston v. Nevin*, 128 U. S. 578."

Due process of law; equal protection of the law defined.

"Due process of law is not violated, and the equal protection of the laws is given, when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the State, and where the party who may subsequently be charged in his property has had a hearing or an opportunity for one provided by the statute. *Kelly v. Pittsburg*, 104 U. S. 78."

Notice of hearing.

"The publication of a notice of the proposed presentation of the petition is a sufficient notification to those interested in the question and gives them an opportunity to be heard before the board. *Hagar v. Reclamation District*, 111 U. S. 701; *Lent v. Tillson*, 140 U. S. 316; *Paulsen v. Portland*, 149 U. S. 30."

Special assessments disproportioned to benefits.

"Assume that the only theory of these assessments for local improvements upon which they can stand is

that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an ad valorem method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the State legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law."

"We do not discover, and our attention has not been called to any case in this court where such an assessment has been held to violate any provision of the Federal Constitution. If it do not, this court can grant no relief."

"The method of assessment here provided for may not be the best which could have been adopted in order to accomplish the most equal and exact justice which the nature of the case permits. But none the less we are unable to say that it runs counter to any provision of the Federal Constitution, and we must for that reason hold the objection here considered to be untenable." *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369.

Special assessments on abutting lands to pay price of land taken for street and costs of condemnation.
704. (Ohio, 1898.) The village of Norwood, by legal proceedings, appro-

priated a strip of land belonging to Mrs. Baker for a street, and paid her the amount of damages assessed by a jury, \$2,000. The village, to reimburse itself, then assessed against her abutting lands the said damages and, in addition, the costs of the appropriation proceedings, in the aggregate \$2,218.58, payable in installments, in pursuance of provisions of the statutes of Ohio. Mrs. Baker prosecuted an action in the United States Circuit Court to obtain a decree restraining the village from enforcing the assessment, on the ground "that the assessment in question was in violation of the Fourteenth Amendment providing that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws as well as of the bill of rights of the Constitution of Ohio." The decree of the Circuit Court was in favor of Mrs. Baker, and on appeal the Supreme Court affirmed the judgment of the Circuit Court.

"It has been adjudged that the due process of law prescribed by that amendment requires compensation to be made or secured to the owner when private property is taken by a State or under its authority for public use. *Chicago, Burlington, etc., Railroad v. Chicago*, 166 U. S. 226, 241; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 695."

"Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property, such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. *Mobile County v. Kimball*, 102 U. S. 691, 703, 704; *Illinois Central Railroad v. Decatur*, 147 U. S. 190, 202; *Bauman v. Ross*, 167 U. S. 548, 589, and authorities there cited. And according to the weight of judicial authority the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements. In *Williams v. Eggleston*, 170 U. S. 304, 311, where the only question, as this court stated, was as to the power of the legislature to cast

the burden of a public improvement upon certain towns, which had been judicially determined to be towns benefited by such improvement, it was said: 'Neither can it be doubted that, if the State Constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement.'

"But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property."

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say, 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

"The assessment was in itself an illegal one because it rested upon a basis that excluded any consideration of benefits."

"She (plaintiff) was entitled without making such a tender to ask a court of equity to enjoin the enforcement of a rule of assessment that infringed upon her constitutional rights. In our judgment the Circuit Court properly enjoined the enforcement of the assessment as it was, without going into proofs as to the excess of the cost of opening the street over special benefits."

The view indicated in the opinion is, namely:

"That while abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it,

that is, by benefits that are not shared by the general public; and that taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation."

"We have considered the question presented for our determination with reference only to the provisions of the National Constitution. But we are also of opinion that, under any view of that question different from the one taken in this opinion, the requirement of the Constitution of Ohio, that compensation be made for private property taken for public use, and that such compensation must be assessed 'without deduction for benefits to any property of the owner,' would be of little practical value if, upon the opening of a public street through private property, the abutting property of the owner, whose land was taken for the street, can, under legislative authority, be assessed not only for such amount as will be equal to the benefits received, but for such additional amount as will meet the excess of expense over benefits."

A number of cases reviewed. *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. Rep. 187, 43 L. Ed. 443.

Waiver of constitutional right.

705. (D. C. 1901.) "The constitutional right against unjust taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid.

"Under some circumstances, a party who is illegally assessed may be held to have waived all right to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and encourage the levy of the tax of which he subsequently complains; and some of the cases * * * go far in the direction of holding that a mere failure to give notice of objections to one who, with the knowledge of the person taxed, as contractor or otherwise, is expending money in reliance upon payment from the taxes, may have the same effect."

Assessment of benefits not required to be made by a jury; notice to owners of property.

Following *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. Rep. 966, 42 L. Ed. 270; Held, "That the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be intrusted to commissioners appointed by a court, or to an inquest consisting of more or fewer men than an ordinary jury." That the ascertainment of the lands to be assessed and the apportionment of benefits among them may be committed to the same tribunal.

That if the legislature in such cases "makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law."

Any part of expense of improvement may be assessed against abutting property.

"That the provisions of the statute under consideration, which regulated the assessment of damages, are to be referred not to the right of eminent domain, but to the right of taxation, and that the legislature in the exercise of the right of taxation, has the authority to direct the whole or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of lands benefited thereby; and that such authority has been repeatedly exercised in the District of Columbia by Congress with the sanction of this court."

"That the class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands and such only as the commissioners shall decide to be benefited; that the rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position,

the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners."

A number of other cases to the same effect noticed. *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. Rep. 187, 43 L. Ed. 443, distinguished. *Wight v. Davidson*, 181 U. S. 371, 21 Sup. Ct. Rep. 616.

Assessment by foot frontage for improvement of street.

706. (N. Y. 1901.) This was a bill in equity by a property owner to enjoin a special assessment, levied according to the foot frontage against his property to pay the expense of street improvement. "The complainant in the court below did not put his claim for equitable relief upon any allegation that, in the proceedings to pave Delaware street and to assess the cost of the improvement upon the abutting property, there had been any departure from the provisions of the statute, or that there had been attempted any discrimination against him or his property. Nor was it denied that it is the settled law of the State of New York that the method prescribed, of meeting the expense by apportioning the entire cost of such an improvement upon the abutting land according to the foot-front rule, is a valid exercise of legislative power."

It was claimed that the statute under which the assessment was made violated the Fourteenth Amendment to the Federal Constitution. Referring to the case of *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. Rep. 187, 43 L. Ed. 443, the court say:

"It was not the intention of the court, in that case, to hold that the general and special taxing systems of the States, however long existing and sustained as valid by their courts, have been subverted by the 14th Amendment of the Constitution of the United States. The purpose of that amendment is to extend to the citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty, and property, as is afforded by the 5th amendment against similar legislation by Congress. The case of *Norwood v. Baker* presented, as the judge in the court in the present case well said, 'considerations of peculiar and extraordinary hardships,' amounting,

in the opinion of a majority of the judges of this court, to actual confiscation of private property to public use, and bringing the case fairly within the reach of the 14th amendment.

"The facts disclosed by the present record do not show any abuse of the law, nor that the burdens imposed on the property of the complainant were other than those imposed upon that of other persons in like circumstances; and it is obvious, from expressions in the opinion of the trial judge, that he reached his conclusion because constrained by what he understood to be the principle established by the Norwood case." *Tonawanda v. Lyons*, 181 U. S. 389, 21 Sup. Ct. Rep. 609.

Assessment according to valuation or frontage.

707. (No. Dak. 1901.) An action to enjoin special assessments for improving a street. The laws of the State had been complied with, but it was claimed that such laws were in violation of the Fourteenth Amendment to the Constitution of United States. The questions arose on demurrer to the complaint.

"But we agree with the Supreme Court of North Dakota in holding that it is within the power of the legislature of the State to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage, and that it was not the intention of this court in *Norwood v. Baker*, to hold otherwise." *Webster v. City of Fargo*, 181 U. S. 394, 21 Sup. Ct. Rep. 623.

Intent of fourteenth amendment to the constitution of United States.

708. (Mich. 1901.) An action to set aside assessments and tax sales of complainant's lands. The assessments were made for improving a street in pursuance of the statutes of Michigan. It was claimed that the statutes were in violation of the Fourteenth Amendment to the Constitution of United States. Held, "It was not the intention of the 14th amendment to subvert the systems of the States pertaining to general and special taxation; that that amendment legitimately operates to extend to the citizens and residents

of the States the same protection against arbitrary State legislation affecting life, liberty, and property, as is afforded by the 5th Amendment against similar legislation by Congress; and that the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of *Norwood v. Baker*." *Detroit v. Parker*, 181 U. S. 399, 21 Sup. Ct. Rep. 624.

Special assessments, or general tax, and manner of levying are legislative questions for the states.

709. (Mo. 1901.) This was a suit to enforce the lien of special assessments levied to pay the cost of the improvement of a street in Kansas City, Missouri, in accordance with the charter of the city. It was urged that the charter provisions were in violation of the Fourteenth Amendment to the Constitution of United States.

The fifth and fourteenth amendments to the constitution compared.

"While the language of those amendments is the same, yet, as they were ingrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper."

"Certainly, it cannot be supposed that by the Fourteenth Amendment it was intended to impose on the States, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal government, in a similar exercise of power, by the 5th Amendment."

After an extended discussion and review of its former decisions, the court adopt the following propositions of law as applicable to the case:

"The major part is sometimes assessed on estates benefited while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits. The whole cost in other cases is levied on lands in the immediate vicinity of the work.

in a constitutional point of view either of these methods is admissible, and one may be sometimes just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule. *Cooley Taxn.* 447. The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. * * *

Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency. 2 *Dill. Mun. Corp.*, § 752, 4th ed." *Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. Rep. 187, distinguished. *French v. Barber Asphalt Pav. Co.*, 181 U. S. 324, 21 Sup. Ct. Rep. 625.

Special assessments according to frontage.

710. (*Mich.* 1901.) An action to enjoin the city of Detroit, Mich., from paving a street, on the ground that, so far as the ordinance of the city provided for an assessment of the cost of the improvement upon abutting property in proportion to the frontage, it violated the Constitution of the United States.

"We have recently held that it was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation; that that amend-

ment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty, and property as is afforded by the Fifth Amendment against similar legislation by Congress, and that the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State applicable to all persons in like circumstances and conditions but only where there is some abuse of law amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of *Norwood v. Baker*." *Cass Farm Co. v. City of Detroit*, 181 U. S. 399, 21 Sup. Ct. Rep. 644.

Front foot assessments not invalid under Fourteenth Amendment.

711. (*Ky.* 1904.) "There is a lack of logic when it is said that special assessments are founded on special benefits and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land, indeed, whether it is a benefit at all, is a matter of forecast and estimate. In its general aspects at least it is peculiarly a thing to be decided by those who make the law. The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district, the municipality, and to disguise rather than to answer the theoretic doubt. It is dangerous to tie down legislatures too closely by judicial constructions not necessarily arising from the words of the Constitution. Particularly, as was intimated in *Spencer v. Merchant*, 125 U. S. 345, it is important for this court to avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness in order to destroy methods of taxation which were well

known when that amendment was adopted and which it is safe to say that no one then supposed would be disturbed. It now is established beyond permissible controversy that laws like the one before us are not contrary to the Constitution of the United States. *Walston v. Nevin*, 128 U. S. 578; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324; *Webster v. Fargo*, 181 U. S. 394; *Cass Farm Co. v. Detroit*, 181 U. S. 396; *Detroit v. Parker*, 181 U. S. 399; *Chadwick v. Kelley*, 187 U. S. 540, 543, 544; *Schaefer v. Werling*, 188 U. S. 316; *Seattle v. Kelleher*, 195 U. S. 351, 358." *Louisville & Nashville Railroad Company v. Barber Asphalt Paving Company*, 197 U. S. 430, 25 Sup. Ct. Rep. 466, — L. Ed. —.

Benefits not determined with reference to particular use of land assessed.

712. (Ky. 1904.) "A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act it would be surprising if the corresponding fact should invalidate an assessment. Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things. And this has been the implication of the cases. *Davidson v. New Orleans*, 96 U. S. 97, 100; *Mattingly v. District of Columbia*, 97 U. S. 687, 692; *Parsons v. District of Columbia*, 170 U. S. 45, 52, 55; *Detroit v. Parker*, 181 U. S. 399, 400; *Chadwick v. Kelley* 187 U. S. 540, 544.

"But in this case it is not necessary to stop with these general considerations. The plea plainly means that

the improvement will not benefit the lot because the lot is occupied for railroad purposes and will continue so to be occupied. Compare *Chicago, Burlington & Quincy R. R. v. Chicago*, 166 U. S. 226, 257, 258. That, apart from the specific use to which this land is devoted, land in a good-sized city generally will get a benefit from having the streets about it paved, and that this benefit generally will be more than the cost, are propositions which, as we already have implied, a legislature is warranted in adopting. But, if so, we are of opinion that the legislature is warranted in going one step further and saying that on the question of benefit or no benefit the land shall be considered simply in its general relations and apart from its particular use. See *Illinois Central R. R. v. Decatur*, 147 U. S. 190. On the question of benefits the present use is simply a prognostic, and the plea a prophecy. If an occupant could not escape by professing his desire for solitude and silence, the legislature may make a similar desire fortified by structures equally ineffective. It may say that it is enough that the land could be turned to purposes for which the paving would increase its value. Indeed, it is apparent that the prophecy in the answer cannot be regarded as absolute, even while the present use of the land continues—for no one can say that changes might not make a station desirable at this point; in which case the advantages of a paved street could not be denied. We are not called on to say that we think the assessment fair. But we are compelled to declare that it does not go beyond the bounds set by the Fourteenth Amendment of the Constitution of the United States." *Louisville & Nashville Railroad Company v. Barber Asphalt Paving Company*, 197 U. S. 430, 25 Sup. Ct. Rep. 466, — L. Ed. —.

Equal protection of the laws—notice to nonresidents.

713. (Ark. 1907.) "The State of Arkansas, by an act of its legislature passed February 15, 1893, created eight

counties, or portions of eight counties, which constituted what was known as 'St. Francis basin,' a levee district, for the purpose of constructing and maintaining levees against the waters of the Mississippi river, and incorporated a board of directors, giving it power to 'levee the St. Francis front in Arkansas and to protect and maintain the same.' The board was also authorized, for the purpose of building, repairing and maintaining the levee, to assess and levy annually a tax on all lands within the district, not exceeding five per cent. of the increased value or betterment estimated to accrue from the protection given by the levee against floods from the river. The act prescribed that the landowners should determine upon the assessments and levy of the tax in a meeting called for that purpose upon notice by the board, and prescribed the procedure to be observed in the assessment and levy of the tax, and provided that the lands assessed should be entered upon the books, in convenient subdivisions, as surveyed by the United States government, with appropriate columns showing the names and residences of owners of the lands, and mortgages of record, if any, known to the assessors; and that no error in the description of the lands should invalidate the assessments, if sufficient description was given to ascertain where the land was situated. The assessment was made a lien upon the lands in the nature of a mortgage."

"The assignments of error present the contention that plaintiffs in error have been deprived of their property without due process of law. One of them urges, in addition, the clauses of the Fourteenth Amendment, which prohibit a State from making or enforcing any law which will abridge the privileges or immunities of citizens of the United States, and from depriving any person within her jurisdiction of the equal protection of the laws. Plaintiffs in error invoke those provisions against the statutes of Arkansas, because of the different

manner and time of service of summons of the suit authorized by said statutes to enforce the payment of the levee taxes. It is contended that, by requiring personal service of summons upon resident owners or occupants of lands for at least twenty days before the rendition of the decree of sale, and providing for constructive service by publication upon nonresident owners of only four weeks, a discrimination is made between owners of lands, and that nonresident owners are thereby denied the rights secured to them by the Constitution of United States. We have no doubt of the power of the State to so discriminate, nor do we think extended discussion is necessary. Personal service upon nonresidents is not always within the State's power. Its process is limited by its boundaries. Constructive service is at times a necessary resource. The land stands accountable to the demands of the State, and the owners are charged with the laws affecting it and the manner by which those demands may be enforced. *Huling v. Kaw Valley R. & Improv. Co.*, 130 U. S. 559, 32 L. Ed. 1045, 9 Sup. Ct. Rep. 603. This accountability of the land and the knowledge the owners must be presumed to have had of the laws affecting it is an answer to the contention of the insufficiency of the service. Certainly it was not so insufficient that it can be said that a difference in the time allowed for such service was not the equivalent of that allowed to resident owners." *Ballard v. Hunter*, 204 U. S. 241, 27 U. S. Sup. Ct. Rep. 261.

Due process of law.

714. (Ark. 1907.) "In passing upon the other contentions of plaintiffs in error we are brought to the consideration of what is due process of law. A precise definition has never been attempted. It does not always mean proceedings in court. *Den ex dem. Murray v. Hoboken Land & Improv. Co.*, 18 How. 272, 15 L. Ed. 372; *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335. Its fundamental require-

ment is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case. *Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623, 9 Sup. Ct. Rep. 231; *Lent v. Tillson*, 140 U. S. 316, 35 L. Ed. 419, 11 Sup. Ct. Rep. 825; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663; *Iowa R. Co. v. Iowa*, 160 U. S. 389, 40 L. Ed. 467, 16 Sup. Ct. Rep. 344."

"We come, then, to what was done in the suit which decreed the sale, and the discussion answers as well for the other assignments of error without specially enumerating them. The ultimate ground of all of them is that the proceedings were conducted without the notice to plaintiffs in error required by the demands of due process of law. In discussing the contention of plaintiffs in error, that they had been denied the equal protection of the laws by the different manner of service upon resident and nonresident owners of land, and the different times for appearance after service, we declared that it was competent for the State to make the distinction, and that the notice and time were adequate to afford due process of law. And we will pass to the consideration of the other objections. The most important are the following: That there was no sufficient affidavit made and filed to support a warning order or order for notice to plaintiffs in error, and there was no proof of such order or notice filed or produced in court when the decree was rendered. Replying to these objections, the Supreme Court said:

"3. The act provides that notice by publication shall be given to the defendants in suits instituted for the collections of levee taxes, who are nonresidents of the county where the suits are brought. The plaintiff in the complaint in the proceedings attacked in this suit stated who of the defendants therein were nonresidents of the county in which the proceedings were pending; and such com-

plaint was sworn to. This was sufficient to authorize notice, by publication, without a separate affidavit to the same effect. It was held in *Sannoner v. Jacobson*, 47 Ark. 31, 14 S. W. 458, that an affidavit and complaint may be included in one instrument of writing, if it contains all the essentials of both. The complaint in the proceedings attacked contained the essentials of the affidavit and is sufficient to answer the same purpose. *Johnson v. Hunter*, supra."

"The statute provides that all or any part of the delinquent lands for a county may be included in the suit instituted in such county, and there may be included in the suit known and unknown owners; 'and notice of the pendency of such suit shall be given as against nonresident owners of the county and unknown owners, respectively,' by publication weekly. The time of publication is specified. The complaint showed that Ballard was the owner of the lands and that he was a nonresident of the county. It was said, however, that Josephine Ballard was not made a defendant in the suit, though the records of the county showed that she was an owner thereof. But the statute provided against such an omission. It provided that the proceedings and judgment should be in the nature of proceedings in rem, and that it should be immaterial that the ownership of the lands might be incorrectly alleged in the proceedings. We see no want of due process in that requirement, or what was done under it. It is manifest that any criticism of either is answered by the cases we have cited. The proceedings were appropriate to the nature of the case.

"It should be kept in mind that the laws of a State come under the prohibition of the Fourteenth Amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to everyone. It charges everyone with knowledge of its pro-

visions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises. This was pointed out in *Huling v. Kaw Valley R. & Improv. Co.*, 130 U. S. 559, 32 L. Ed. 1045, 9 Sup. Ct. Rep. 603, where it was declared to be the 'duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition; and, if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences.' It makes no difference, therefore, that plaintiffs in error did not have personal notice of the suit to collect the taxes on their

lands or that taxes had been levied, or knowledge of the law under which the taxes had been levied." *Ballard v. Hunter*, 204 U. S. 241, 27 Sup. Ct. Rep. 261.

Notice by publication and opportunity to be heard, due process of law.

715. (Ky. 1902.) Neither are we prepared to say that there has not been due process of law, in the opportunity afforded to appear and be heard by exceptions in pursuance of the publication required by the act. The proceeding was in all its essentials a proceeding to assess and collect a tax through the special machinery provided by the act. Notice by publication, and opportunity to appear and be heard, is due process, in proceedings of this nature. *Lent v. Tillson*, 140 U. S. 316, 326, 11 Sup. Ct. 825, 35 L. Ed. 419; *Paulsen v. City of Portland*, 149 U. S. 30, 40, 13 Sup. Ct. 750, 37 L. Ed. 637. *Campbellsville Lumber Co. v. Hubbert*, 50 C. C. A. 435, 112 Fed. 718.

D. Operation of Constitutional Provisions, When Prospective.

Constitutional provisions prospective.

716. (Mo. 1876.) The Constitution of Missouri, adopted in 1865, provided as follows:

"The general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto" Held, that this provision did not affect powers conferred by statutes then existing.

"It has been held in many cases by the Supreme Court of Missouri, that the provision of the Constitution of 1865, prohibiting loans or subscriptions for stock, except with the

assent of the electors, is prospective, not retroactive; that the charter of a company which is in existence before the adoption of the constitutional provision is not affected by it, but the powers given by it remain as if no such Constitution existed. *State v. Macon County Court*, 41 Mo. 453; *Smith v. County of Clark*, 54 id. 58: Although put into execution by making the subscription or issuing the bonds after the adoption of the Constitution, the power remains valid."

Amendments of such statutes not prohibited.

"The Constitution of 1865 contains, in connection with the provision already quoted, the following: 'All statute laws of the State now in force,

not inconsistent with the Constitution, shall continue in force until they shall expire by their own limitations, or be amended or repealed by the general assembly.' In *State of Missouri v. Cape Girardeau & State Line Railroad*, 48 Mo. 468, it was held that the constitutional provision prohibiting special enactments did not extend to amendments of laws in force when it was adopted, but that additional power given to the Cape of Girardeau Railroad, by the means of an amendment to its charter, was a lawful exercise of authority." *County of Callo-way v. Foster*, 93 U. S. 567, 23 L. Ed. 911.

Construction of constitutional provision; prospective operation.

717. (Mo. 1876.) The Constitution of Missouri declared that, "The general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

"This prohibition, it will be observed, is against the legislature's authorizing municipal subscriptions or aid to private corporations; it does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come. This has been settled by the Supreme Court of Missouri in several well-considered decisions." *County of Scotland v. Thomas*, 94 U. S. 682, 24 L. Ed. 219; *County of Macon v. Shores*, 97 U. S. 272, 24 L. Ed. 889.

Amendment of constitution; effect on existing laws.

718. (Mo. 1877.) The charter of a railroad company granted prior to the adoption of the Constitution of Missouri in 1865, "according to the settled law of the State did not become subject to the provision of that Constitution which requires the assent of two-thirds of the lawful voters of a county to a subscription of stock in aid of the railroad." *County of Henry v. Nicolay*, 95 U. S. 619, 24 L. Ed. 394.

Prospective operation.

719. (Mo. 1877.) The Constitution of Missouri ordained that, "The general

assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." Held, that this provision did not affect the validity of a subscription to the stock of a railroad company made under laws existing at its adoption; that the provision was a limitation upon the future power of the legislature, and did not apply to laws in existence when it was adopted. *County of Ray v. Vansycle*, 96 U. S. 675, 24 L. Ed. 800.

To the same effect is *County of Schuylcr v. Thomas*, 98 U. S. 169, 25 L. Ed. 88.

Operation of constitutional provisions prospective.

720. (Miss. 1878.) The Constitution of Mississippi, ratified December 1, 1869, declared:

"Sect. 14. The legislature shall not authorize any county, city or town to become a stockholder in, or to lend its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town at a special election, or regular election, to be held therein, shall assent thereto." Held, that this provision did not abrogate the existing statutes.

"The learned counsel for the plaintiff in error insists that this section abrogated the act of 1860, and avoids the bonds. It will be observed that the language of the section is wholly prospective. It is, in effect, that the legislature shall not, in the future, authorize any county, city, or town (without the consent of two-thirds of the legal voters), to do either of two things:

1. Become a stockholder in any company, association, or corporation. 2. Lend its credit to any company, association, or corporation. The restraint is upon the legislature. It is forbidden to do thereafter either of the two prohibited things."

A number of authorities cited to this proposition. *Supervisors v. Galbraith*, 99 U. S. 214, 25 L. Ed. 410.

To same effect is *Howard County v. Paddock*, 110 U. S. 384, 4 Sup. Ct. Rep. 24, 28 L. Ed. 171.

Prospective operation.

721. (Mo. 1881.) The Constitution of Missouri of 1865 declared as follows: "The general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." Held, following the decisions of the Supreme Court of Missouri, that the provision was, "A limitation merely upon the power of the legislature for the future, so that it should not thereafter grant to municipal corporations authority to become stockholders in companies except upon the terms expressly mentioned, and that all previous grants of such authority remain in their original force until duly revoked, unaffected by the constitutional provision." *Louisiana v. Taylor*, 105 U. S. 454, 26 L. Ed. 1133.

Constitutional provisions prospective.

722. (Mo. 1881.) The provision of the Constitution of Missouri of 1865, article 11, section 14, prohibiting a county from becoming a stockholder in or loaning its credit to, a corporation without a vote of the people, was intended as a limitation on future legislation only, and did not operate to repeal enabling acts in existence when the Constitution took effect.

County bonds without internal revenue stamp.

County bonds and coupons issued in the years 1870 and 1871, in payment of subscriptions to the stock of railroad companies, were held admissible in evidence on the trial of an action against the county for the recovery of the amount due thereon, although not stamped as obligations for the payment of money under the provisions of the internal revenue laws of the United States in force at the time of their issue. *County of Ralls v. Douglass*, 105 U. S. 728, 26 L. Ed. 957.

Operation prospective.

723. (Ill. 1881.) The Constitution of Illinois contained this provision: "No county, city, town, township, or other municipality shall ever become a subscriber to the capital stock of any railroad or private corporation, or

make donation to or loan its credit in aid of any such corporation: provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." Held, that a donation to a railroad company voted prior to the adoption of that provision was unaffected by it. *Louisville v. Sav. Bank*, 104 U. S. 469, 26 L. Ed. 775.

To the same effect is *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. Rep. 358, 30 L. Ed. 523.

Bonds voted before, but issued after, adoption of constitution, valid.

724. (Mo. 1884.) "It is no longer an open question in this court that bonds issued by counties in Missouri, during the years 1870 and 1871, in payment of subscriptions to the stock of railroad companies without a vote of the people, are valid if the subscription was made under authority granted before the adoption of the Constitution of 1865, which did not require such a vote to be taken. In *Ralls County v. Douglass*, 105 U. S. 728, the cases in the Supreme Court of the State and in this court bearing on that question are referred to, and our conclusion distinctly stated. We there declined to follow the case of *State v. Dallas County Court*, 72 Mo. 329, decided in 1878, which substantially overruled a long line of cases in the Supreme Court of the State on which our earlier decisions were predicated." *County of Dallas v. McKenzie*, 110 U. S. 686, 4 Sup. Ct. Rep. 184, 28 L. Ed. 285.

Withdrawal of authority by change of constitution.

725. (Ill. 1887.) The Constitution of Illinois, which took effect July 2, 1870, provided that "no county, city, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation; Provided, however, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions or donations, *Chicago & Iowa Railroad v. Pinkney*, 74 Ill. 277; *Fairfield*

v. County of Gallatin, 100 U. S. 47, 50 (25 L. Ed. 544), where the same have been authorized under existing laws, by a vote of the people of such municipalities prior to such adoption." Held, that if the act of March 24, 1869, did, by its terms, authorize the issuing of the bonds involved in this suit, such power was withdrawn by said constitutional provision before the said bonds were issued. *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. Rep. 937, 30 L. Ed. 885.

Operation of constitutional inhibitions prospective.

726. (Mo. 1891.) As to the effect of a prohibition in the Constitution of Missouri of 1865, against granting aid to corporations, etc., without a previous favorable vote,—Held, that it was limited to the future exercise of legislative power, but did not take away any authority granted by the legislature before the Constitution went into effect. *Scotland County Court v. United States ex rel. Hill*, 140 U. S. 41, 11 Sup. Ct. Rep. 697, 35 L. Ed. 351.

Constitutional provision affecting existing laws.

727. (Tenn. 1899.) The Constitution of Tennessee of 1870 provided that, no county, city, or town should be given the power to loan its credit to any corporation except upon a three-fourths affirmative vote of its qualified voters voting at an election; and further provided that all laws then in force and in use in the State not inconsistent with the Constitution, should continue in force until they should expire, be altered, or repealed by the legislature.

"The necessary implication from the provision, and the necessary effect of the Constitution, even without such a provision, must be that laws inconsistent with the Constitution were abrogated and annulled."

"It leaves no power existing. It destroys that, and only confers upon the legislature authority to confer new power, subject to the new condition precedent." *Fidelity Trust & Safety Vault Co. of Louisville v. Lawrence County, Tenn.*, 34 C. C. A. 553, 92 Fed. 576.

E. That Laws Shall Embrace but One Subject, Which Shall Be Expressed in the Title.

Constitutional requirement that act shall contain but one subject.

728. (Tex. 1877.) "When an act of the legislature expresses in its title the object of the act, the title embraces and expresses any lawful means to achieve the object, thus fulfilling the constitutional injunction that every law shall embrace but one object, and that shall be expressed in its title." *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816.

Laws to embrace but one subject to be expressed in the title.

729. (Ill. 1880.) Held, that an act of the legislature of Illinois, entitled "An act supplementary to and amending an act, entitled 'An act to incorporate the Decatur and Indianapolis Railroad, approved Feb. 8th, 1853,'" which legalized certain elections held in Macon county, Illinois, on the question of issuing bonds by the county and authorized townships lying on or near the line of the railroad on certain conditions to subscribe to the stock of the company and issue bonds

therefor, did not violate section 23 of article 3, of the Constitution of Illinois, which provides "No private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title." *Unity v. Burtage*, 103 U. S. 447, 26 L. Ed. 405.

Every law to embrace one object to be expressed in the title.

730. (La. 1881.) The act of the legislature of Louisiana, entitled "An act to consolidate the city of New Orleans, and to provide for the government and administration of its affairs," was held not to be obnoxious to this constitutional provision.

"The article of the Constitution declares that, 'every law enacted by the legislature shall embrace but one object, and that shall be expressed in its title.' A similar provision is found in several State Constitutions. Its object is to prevent the practice, common in all legislative bodies where no such provision exists, of embracing in the same bill incongruous matters,

having no relation to each other, or to the subject specified in the title, by which measures are often adopted without attracting attention, which, if noticed, would have been resisted and defeated. It thus serves to prevent surprise in legislation. But it was not intended to forbid the union of several different provisions in the same bill, if they are germane to the general subject indicated by its title. A bill to incorporate a city and provide for its government may, without conflicting with the constitutional clause, contain provisions relating to the various subjects upon which municipal legislation may be required for the preservation of peace, good order, and health within its limits, the promotion of its growth and prosperity, and the raising of revenue for its government. So here, under the title of the act in question, provisions might be enacted, not merely relating to the union of the different municipalities and the government of the city, but to all the varied details into which the general administration of their affairs might lead." *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090.

Constitutional provision that "every law shall embrace but one subject, and that shall be expressed in the title."

731. (N. J. 1882.) "It is not intended, by the Constitution of New Jersey, that the title to an act should embody a detailed statement, nor be an index or abstract of its contents. The one general object—the creation of an independent municipality—being expressed in the title, the act in question properly embraced all the means or instrumentalities to be employed in accomplishing that object. As the State Constitution has not indicated the degree of particularity necessary to express in its title the one object of an act, the courts should not embarrass legislation by technical interpretations based upon mere form of phraseology. The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or if but one object, that it was not sufficiently expressed by the title." *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. Rep. 391, 27 L. Ed. 431.

Law to embrace but one subject to be expressed in the title.

732. (Ill. 1884.) The title of the act was "An act to amend the charter of the Cairo and St. Louis Railroad Company."

"The contention is, that the legalization of an election previously held, and at which the people voted in favor of a subscription of stock to that company and the granting of authority to issue bonds in payment of such subscription, is not a subject expressed by the title of the act. In this view we do not concur." *Jonesboro City v. Cairo & St. Louis Railroad Co.*, 110 U. S. 192, 4 Sup. Ct. Rep. 67, 28 L. Ed. 116.

Act containing one subject to be expressed in title.

733. (Nebr. 1884.) "It is plain, we think, that the bill does not contain more than one subject. That subject is municipal bonds issued or to be issued to aid in making works of internal improvement. There is but one purpose, object, or subject, and that is the aiding of such works by bonds and the status of such bonds. The subject of the act, to authorize future bonds and legalize existing bonds, for such purpose, is clearly expressed in its title." *Otoe County v. Baldwin*; *Baldwin v. Otoe County*. 111 U. S. 1, 4 Sup. Ct. Rep. 265, 28 L. Ed. 331.

Act to embrace one subject, etc.

734. (Iowa, 1885.) Held in conformity with the decisions of the Supreme Court of Iowa, that, "The object of the constitutional provision, that court said, was 'to prevent the union in the same act of incongruous matter, and of objects having no connection, no relation' and 'to prevent surprise in legislation, by having matter of one nature embraced in a bill whose title expressed another;' but, that, 'it cannot be held with reason that each thought or step towards the accomplishment of an end or object should be embodied in a separate act;' that 'the unity of object is to be looked for in the ultimate end, and not in the details or steps leading to the end;' and that 'so long as they are of the same nature, and come legitimately under one general denomination or object,' the act is constitutional." *Ackley School District v. Hall*. 113 U. S. 135, 5 Sup. Ct. Rep. 371, 28 L. Ed. 954.

Constitutional requirement that act shall embrace one subject, etc.

737. (Ill. 1886.) "In States where constitutional provisions like that now under consideration have been decided to be mandatory, and not directory only, it has generally been held that the requirement is satisfied if the law has but one general object, and that is clearly expressed in the title. It is enough if the body of the act is germane to the title."

The object of this provision discussed and numerous authorities noticed. *Mahomet v. Quackenbush*, 117 U. S. 508, 6 Sup. Ct. Rep. 858, 29 L. Ed. 982.

Constitutional requirement that the subject of a statute shall be clearly expressed in its title.

736. (Ky. 1887.) "Undoubtedly the design of this provision was, as is said in *Pennington v. Woolfolk*, 79 Ky. 20, 'to prevent the use of deceptive titles as a cover for vicious legislation, by enabling members of the general assembly to form such opinion of the nature of a bill by merely hearing it read by its title;' but as early as 1859 the Court of Appeals said in *Phillips v. Covington & Cincinnati Bridge Company*, 2 Metc. (Ky.) 219, 221. 'This prohibition should receive a reasonable and not a technical construction; and looking to the evil intended to be remedied, it should be applied to such acts of the legislature alone as are obviously within its spirit and meaning. None of the provisions of a statute should be regarded as unconstitutional where they all relate directly or indirectly to the same subject, have a natural connection and are not foreign to the subject expressed in its title.' This is in accord with the decisions of this court, in *Montclair v. Ramsdell*, 107 U. S. 147, where we followed the rulings of the Supreme Court of New Jersey, upon a similar provision in the Constitution of that State; in *Jonesboro City v. Cairo & St. Louis Railroad*, 110 U. S. 192, and *Mahomet v. Quackenbush*, 117 U. S. 509, where the Constitution of Illinois and the decisions of the Supreme Court of that State were considered; and in *Otoe County v. Baldwin*, 111 U. S. 1, which had reference to the Constitution of Nebraska, and the settled rule of decision in that State; and in *Ackley School District v. Hall*, 113 U. S. 135, which arose in Iowa. It is enough if the

law has but one general object, and that object is fairly expressed in its title. *Cooley on Const. Lim.* (1st ed.), 144, § 2 (4th ed.), 175." *Carter County v. Sinton*, 120 U. S. 517, 7 Sup. Ct. Rep. 650, 30 L. Ed. 701.

Constitutional provision that "no bill shall contain more than one subject, which shall be clearly expressed in its title."

§ 737. (Kan. 1895.) The title of the bill was: "An act to enable counties, municipal corporations, boards of education of any city, and school districts, to refund their indebtedness." "The contention is that townships are not municipal corporations proper, but quasi-municipal corporations, like counties, boards of education and school districts; and, inasmuch, as the title of the bill especially mentioned these quasi-municipal corporations, the presumption is that no quasi-municipal corporations were referred to by the term 'municipal corporations.' This argument is more ingenious and plausible than convincing." Held, that the term "municipal corporations" in the act included townships.

"The object of the constitutional provision under consideration is to require the title of a bill to give notice to the legislature of the subject treated in it. There was nothing to call the attention of the legislators to the rather nice distinction between municipal and quasi-municipal corporations in the enactment of this law, which confessedly empowers some classes of both municipal and quasi-municipal corporations to refund their indebtedness; and it is more probable that the term 'municipal corporations' in the title to this bill gave notice to the legislature that the bill treated of authority for all public political corporations of the State to refund their indebtedness, than that it gave notice to them that it excluded municipal townships from the exercise of that authority." *West Plains Township, Meade County v. Sage et al.*, 16 C. C. A. 553, 69 Fed. 943.

Constitutional declaration that "no law shall embrace more than one subject, which shall be expressed in its title."

738. (Minn. 1898.) As to the purpose of this constitutional requirement the court say:

"It was not adopted to prevent the

legislature from inserting in an act any provision which is germane to the general subject to which the act relates, but to prevent surreptitious legislation, and the union in the same act of incongruous matters, which have no natural relation to each other, or to the general subject with which an act deals."

• A number of cases cited.

Narrow or technical construction not proper.

"This provision of the Constitution ought not to receive a narrow or technical construction, which will embarrass legislation by making laws unnecessarily restrictive in their scope and operation; but, like all provisions of the organic law, it should be fairly and liberally interpreted and enforced, so that it will serve to prevent the abuses at which it was aimed, without placing unnecessary restraints upon legislative action. The act like the one now in hand, which revises and amends the charter of a city located on the bank of a large river, is certainly not obnoxious to a constitutional provision limiting legislative measures to one subject, merely because the act authorizes the municipality, among other things, to issue bonds for the purpose of defraying the cost of a railroad and wagon bridge across such river. A provision of that kind has a natural and an obvious relation, to the general subject, to which the attention of the legislature was for the time being addressed, and for that reason such a provision must be pronounced germane to the general purpose of the act." *City of South St. Paul v. Lamprecht Bros. Co.*, 31 C. C. A. 585, 88 Fed. 449.

Constitutional provision that no bill shall contain more than one subject, etc.

739. (*Colo.* 1899.) "The alleged vice of the act is that it contained more than one subject, in that it embraced the subject of refunding county debts evidenced by bonds, and the subject of refunding county debts evidenced by judgments. If this is a vice, it is not perceived why a bill to enable the counties of the State to refund their debts evidenced by bonds alone would not be equally obnoxious to the prohibition of the Constitution; for the debt evidenced by each bond is a different debt and a different subject

from that evidenced by every other bond, in the same sense that a county debt evidenced by a judgment is a different subject from one evidenced by a bond. The deliberate enactments of legislatures cannot be whistled down the wind on such frivolous pin points as this. The object of this constitutional provision was twofold. It was to prevent surreptitious legislation, the insertion of enactments in bills which were not indicated by their titles, and to forbid the treatment of incongruous subjects in the same act. It never was intended to prevent the legislature from treating all the various branches of the same general subject in one law, or from inserting in a single act all the legislation germane to its principal subject. *Travelers' Ins. Co. v. Oswego Township*, 19 U. S. App. 321, 332, 7 C. C. A. 669, 676, and 59 Fed. 58, 64; *City of Omaha v. Union Pac. Ry. Co.*, 36 U. S. App. 615, 623, 20 C. C. A. 219, 223, and 73 Fed. 1013, 1017; *City of South St. Paul v. Lamprecht Bros. Co.*, 31 C. C. A. 585, 587, 88 Fed. 449, 451; *Clare v. People*, 9 Colo. 122, 125, 10 Pac. 799; *Canal Co. v. Bright*, 8 Colo. 144, 149, 6 Pac. 142; *People v. Goddard*, 8 Colo. 432, 436, 7 Pac. 301; *Tabor v. Bank*, 27 U. S. App. 111, 10 C. C. A. 429, and 62 Fed. 383; *Johnson v. Harrison*, 47 Minn. 575, 577, 50 N. W. 923; *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. Rep. 391; *Cooley Const. Lim.* (6th ed.), pp. 169-172, and cases there cited. The general subject of the act of 1889 was the refunding of county debts. Judgments, bonds and warrants are different forms of such debts; and the refunding of any or all county debts is but one general subject, and may well be embraced in a single act. The fact that but two branches of this general subject—the refunding of judgments and bonds—are treated in this act does not render it obnoxious to the inhibition of the Constitution. It is not a valid objection to the act of 1889, under sect. 21, art. 5. of the Constitution, that it treats of refunding both judgments and bonds, because the refunding of judgments against counties and the refunding of their bonds are but branches of a single subject,—the general subject of refunding county debts." *Geer v. Board of Comrs. of Ouray County, Colo.*; *Comrs. of Ouray County v. Geer*, 38 C. C. A. 250, 97 Fed. 435.

F. Inhibitions Against Special Legislation; Uniform Operation of Laws.

Special act conferring corporate power.

740. (Nebr. 1880.) The Constitution of Nebraska declared that "The legislature shall pass no special act conferring corporate power." Held, that an act, entitled "An act authorizing School District Number 56, of Richardson county, to issue bonds for the purpose of erecting a school building, procuring a site therefor, and for setting apart a fund to pay the same," violated that provision of the Constitution as by the laws of Nebraska, a school district was a corporate body. *School District v. Insurance Co.*, 103 U. S. 707, 26 L. Ed. 601.

The legislature shall pass no special act conferring corporate power.

741. (Nebr. 1882.) "It is contended that the act in question, by legalizing bonds of the city, void because it had no power to issue them, is legally equivalent to an act conferring upon the city power to issue bonds, which is conferring corporate power, and, being a special act, is therefore unconstitutional. But this conclusion we cannot adopt. The act in question, so far as it relates to the bonds in suit, does not confer any corporate power upon the city in the sense of the Constitution of the State. The statute operates upon the transaction itself, which had already previously been consummated, and seeks to give it a character and effect different in its legal aspect from that which it had when it was in fieri. Whether such an effort may be given by a legitimate exercise of legislative power, depends upon those considerations which draw the line beyond which retroactive laws cannot pass, and is not affected by the supposed form of the enactment as a special or general act conferring corporate power. For it operates upon the rights of the parties, as determined by the equity of their circumstances and relations, and gives to them the sanction derived from subsequent confirmation, by clothing them with forms which are essential to their enforcement, but not to their existence. Within the usual limitations prescribed by our written Constitutions, such as have been quoted from that of Nebraska, this may be done, provided it can be done without the destruction

of rights recognized by the law as vested."

"As the city of Plattsmouth was bound, by force of the transaction, to repay to the purchaser of its void bonds the consideration received and used by it, or a legal equivalent, the statute which recognized the existence of that obligation, and, by confirming the bonds themselves, provided a medium for enforcing it according to the original intention and promise, cannot be said to be a special act conferring upon the city any new corporate power. No addition is made to its enumerated or implied corporate faculties; no new obligation is, in fact, created. The language of the Constitution, forbidding special legislation of that description, evidently refers to grants of authority to be exercised by the body itself and in the future, and a consideration of the evil intended to be remedied by the prohibition will confine it to grants of that character, and will not include a statute like that now under discussion. Here the power of the legislative department of the State is directly exercised upon the transaction itself, and upon a matter clearly within the scope of its authority."

"It is not a special act conferring corporate power; it is merely a special act taking away from the corporation the power to interpose an unconscionable defense against a just claim, and to avoid an obligation to pay an equivalent for public benefits, which it has continued to enjoy." *Read v. Plattsmouth*, 107 U. S. 568, 2 Sup. Ct. Rep. 208, 27 L. Ed. 414.

The decision in the above case followed, and the authorities relating to the question reviewed, in *Springfield Safe Deposit & Trust Co. v. City of Attica*, 85 Fed. 387, 29 C. C. A. 214.

The legislature shall pass no special act conferring corporate power.

742. (Nebr. 1884.) Held, that this constitutional inhibition is not infringed by the passage of an act authorizing a county which was indebted to issue its bonds for such indebtedness.

Note.—This case seems to have been so decided on the theory that to authorize any corporate municipal or

quasi-municipal body to issue bonds in settlement of an existing indebtedness does not confer corporate power. After referring to several cases sustaining this view the court say:

"In the cases of *Clegg v. School District*, 8 Neb. 178, and *Dundy v. Richardson County*, id. 508, cited by plaintiff in error, it was held that an act authorizing a school district or a city to contract a debt for the purpose of erecting a public building, and to issue bonds therefor, was forbidden by the Constitution because it was a special act conferring corporate powers. These cases are clearly distinguishable from those we have cited. In the latter, as in the case now under review, a debt already existed, and the statute simply authorized a change in the form of the obligation by which the debt was evidenced." *Sherman County v. Simons*, 100 U. S. 735, 3 Sup. Ct. Rep. 502, 27 L. Ed. 1093.

Constitutional provision; laws of general nature; uniform operation.

743. (Kan. 1898.) A curative act of the legislature of Kansas, in terms declared the bonds in suit to be legal and valid. Said curative act was held not to violate section 17, article 2, of the Constitution of Kansas, that "all laws of a general nature shall have a uniform operation throughout the State. in all cases where a general law can be made applicable, no special law shall be enacted." Following the decisions of the Supreme Court of Kansas. Held, that the question whether a general law can be made applicable in a given case is one for legislative determination, and not subject to review by the courts. *Springfield Safe Deposit & Trust Co. v. City of Attica*, 20 C. C. A. 214, 85 Fed. 387.

Constitutional provision prohibiting special laws, where general laws can be made applicable; a question for legislature to determine; State decision followed.

744. (Kan. 1898.) This court follows the rule of decision of the Supreme Court of Kansas, in holding that under the constitutional provision of that State that "All laws of a general nature shall have a uniform operation throughout the State; and in all cases where a general law can be made applicable, no special law shall be enacted," the determination of the question whether or not a general law can be made applicable to any subject

is a purely legislative function and the enactment of a special law, even when a general law on the subject is already in force, settles the question and makes the special law impregnable to attack under this clause of the Constitution of that State. *Board of Comrs. of Seward County, Kan., v. Aetna Life Ins. Co.*, 32 C. C. A. 585, 90 Fed. 222.

Laws of temporary and local nature.

745. (Ohio, 1901.) An act authorizing a township in Ohio to refund its existing indebtedness is one of a temporary and local nature, and does not violate the provisions of section 28 of article 2 of the Constitution of Ohio, which provides that all laws of a general nature shall have a uniform operation throughout the State according to the rule of decisions of the Supreme Court of the State in force when the bonds in suit were issued. *Board of Trustees v. Brattleboro Savings Bank*, 106 Fed. 986, 46 C. C. A. 66.

Law applicable to a class of cities does not violate Constitution of California.

746. (Cal. 1902.) "It is contended that this act violates the provision of the Constitution against special legislation. But there can be no question that the act classifying municipal corporations is constitutional. *Pritchett v. Stanislaus County*, 73 Cal. 310, and that in matters pertaining to municipal organization the legislature may make different regulations for the different classes so created. *Pasadena v. Stimson*, 91 Cal. 249. The subject-matter of the act in question—the funding of municipal indebtedness—is "peculiarly a matter pertaining to municipal organizations, and still more peculiarly a matter as to which cities of large population require different provision from that suitable to cities or towns of small population." The act is, therefore, not obnoxious to that objection." *Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. Rep. 327, — L. Ed. —.

Special act under Kansas Constitution.

747. (Kan. 1902.) The Constitution of Kansas prohibits the enactment of a special law when a general law can be made applicable.

"The doctrine is firmly established in the State of Kansas that it is the province of the legislature, and not

the province of the courts, to judge of the necessity for special legislation. The subject was considered by this court in *Rathbone v. Board*, 21 C. C. A. 477, 83 Fed. 125, and in *Travelers' Ins. Co. v. Oswego Tp.*, 7 C. C. A. 639, 59 Fed. 58, and the Kansas decisions on the subject are there col-

lected—particularly in the case first above cited. We deem the local decisions contravening the constitutional provision in question as binding upon this court, and nothing further need be said on that subject." Board of Commissioners v. Vandriss, 53 C. C. A. 192, 115 Fed. 806.

G. Miscellaneous.

Constitutional prohibition against taking private property for public use without just compensation; no reference to taxation

748. (Neb. 1872.) "The clause prohibiting taking private property for public use without just compensation has no reference to taxation. If it has, then all taxation is forbidden, for 'just compensation' means pecuniary recompense to the person whose property is taken equivalent in value to the property. If a county is authorized to build a courthouse or a jail, and to impose taxes to defray the cost, private property is as truly taken for public use without compensation as it is when the county is authorized to build a railroad or a turnpike, or to aid in the construction and to levy taxes for the expenditure. But it is taken in neither case in the constitutional sense. The restriction is upon the right of eminent domain, not upon the right of taxation." *Railroad Co. v. County of Otoe*, 16 Wall. 607, 21 L. Ed. 375.

Uniform rule of taxation.

749. (Mich. 1873.) "The object of this provision was to prevent unjust discriminations. It prevents property from being classified and taxed as classed, by different rules. All kinds of property must be taxed uniformly, or be entirely exempt. The uniformity must be coextensive with the territory to which the tax applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout such county or city. But the rule does not require that taxes for the same purposes shall be imposed in different territorial subdivisions at the same time." *Pine Grove Township v. Talcott*, 19 Wall. 666, 22 L. Ed. 227.

Construction of constitutional provision requiring uniform taxation.

750. (Ill. 1875.) The Constitution of Illinois provided, "That the corporate authorities of counties, town-

ships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." Held, following the decision of the Supreme Court of Illinois, that an act of the legislature intended to validate the bonds of the township which had been illegally issued, violated this provision on the ground "That this section having been intended as a limitation upon the lawmaking power, the legislature could not grant the right of corporate taxation to any but the corporate authorities, nor coerce a municipality to incur a debt by the issue of its bonds." *Township of Elmwood v. Marcy*, 92 U. S. 289, 23 L. Ed. 710.

"Two-thirds of the qualified voters" of a county, city, etc., construed.

751. (Mo. 1875.) The Constitution of Missouri declared that, "The general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto," is not complied with by a statute which requires the assent only of "Two-thirds of the qualified voters who vote at such an election." Held, that this provision applied to townships which were but geographical subdivisions of a county, and are under the control of the county board. *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747.

Noncompliance with constitutional requirements in passage of act.

752. (Ill. 1876.) The authority relied upon for the issuance of the railroad-aid bonds involved in this suit was an act of the legislature of Illinois, approved February 18, 1857, entitled "An act authorizing certain

cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads." It was claimed that the act was void for the reason that it was never passed by the legislature of Illinois. The Constitution of Illinois provided (§ 21): "On the final passage of all bills the vote shall be by ayes and noes and shall be entered on the journal; and no bill shall become a law without the concurrence of a majority of all the members elect in each house." Held, adopting the opinion in a case decided by the Supreme Court of Illinois, "The Constitution requires each house to keep a journal and declares that certain facts made essential to the passage of a law, shall be stated therein. If those facts are not set forth the conclusion is that they did not transpire. The journal is made up under the immediate direction of the house, and is presumed to contain a full and complete history of its proceedings. If a certain act received the constitutional assent of the body, it will so appear on the face of its journal. And when a contest arises as to whether the act was passed, the journal may be appealed to to settle it. It is the evidence of the action of the House, and by it the act must stand or fall." *Town of South Ottawa v. Perkins; Supervisors of Kendall County v. Post*, 94 U. S. 260, 24 L. Ed. 154.

Constitutional construction by State court.

753. (Tenn. 1880.) "If, when the acts in question were passed, the general assembly was without power, under the Constitution, as interpreted by the highest court of Tennessee, to enact a special law authorizing a designated number of counties, without a previous vote of the people, to make subscriptions of stock to a particular railroad running through such counties, our duty is to accept that construction of the fundamental law of the State. But if there was no such contemporaneous or fixed construction, this court, as was the court of original jurisdiction, is under a duty imposed by the Constitution of the United States, from the performance of which it is not at liberty to shrink, to determine, for itself, what were the legal rights of parties at the time the bonds in suit were issued." *County of Tipton v. Locomotive Works*, 103 U. S. 523, 26 L. Ed. 340.

Passage of acts; irregularities held not fatal.

754. (Ill. 1880.) "The contention of the plaintiff in error is that the omission of the word 'Illinois' from the title of the bill in several of its stages in the Senate, and especially in its final passage, defeats it as a law and renders the enactment null and void. The ground of this claim is that, according to the journals of the two houses, 'one bill by one title, passed the House and another bill by another title passed the Senate.' The evidence of the journals of the two houses satisfies us that beyond question there was but one bill, and that was House Bill No. 231, 'to amend an act entitled an act to incorporate the Illinois Grand Trunk Railway;' that this bill regularly passed through all stages by both houses without any change in its title, was signed by their presiding officers respectively, and was approved and signed by the governor. The journals show no amendment to the title of the bill in either house. It is, therefore, perfectly clear that the omission of the word 'Illinois' from the title in some of the stages of its passage through the senate was a mere clerical error in keeping the journals. The designation of the bill as House Bill No. 231 was preserved in all stages of its passage through both houses, and until it was finally signed by the presiding officers of the two houses and approved by the governor. The statute-book of the State of Illinois shows that only one act was ever passed to incorporate any 'Grand Trunk Railway,' and that was the act to incorporate the Illinois Grand Trunk Railway. Therefore the act in question must have been an amendment to that act of incorporation, and could be an amendment to no other. The fact of the identity of the bill passed by the two houses is so clear that it seems to us no court could have any doubt on the subject." *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526.

Uniformity and equality of taxation.

755. (La. 1881.) A law providing for a tax to be levied upon real estate and slaves, to the exclusion of personal property, does not violate that provision of the Louisiana Constitution as follows: "Taxation shall be equal and uniform throughout the State. After the year 1848, all property on which taxes may be levied in this

State shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than any other species of property of equal value on which taxes shall be levied; the legislature shall have the power to levy an income tax, and to tax all persons pursuing any occupation, trade or profession." Nor is that provision of the Constitution violated by a statutory requirement that the taxes, to pay the debts of the constituent bodies assumed by a consolidated city, shall be levied on the properties of the different original bodies in proportion to the indebtedness of each. *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090.

Passage of act; journal of legislative proceedings.

756. (Ill. 1881.) "By the law of the State of Illinois, as often declared by the Supreme Court of that State, before as well as after the execution of the bonds in suit, the provisions of the Constitution of 1848, requiring each house of the legislature to keep and publish a journal of its proceedings, and, on the final passage of all bills, to take the vote by ayes and noes, and ordaining that no bill shall become a law without the concurrence of a majority of all the members elect of each house, are not merely directory; but if the journals, being produced or proved, fail to show that an act has been passed in the mode prescribed by the Constitution, the presumption of its validity arising from the signatures of the presiding officers and of the executive, is overthrown, and the act is void."

"Whether a seeming act of the legislature is or is not a law is a judicial question to be determined by the court, and not a question of fact to be tried by a jury." *Post v. Supervisors; Amoskeag Bank v. Ottawa*, 105 U. S. 667, 26 L. Ed. 1204.

"Two-thirds of the qualified voters" interpreted.

757. (Miss. 1884.) The Constitution of Mississippi declared, that, "The legislature shall not authorize any county, city or town to become a stockholder in, or to lend its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election or regu-

lar election to be held therein, shall assent thereto." Held, "The assent of the two-thirds of the qualified voters of the county, at an election, lawfully held for that purpose to a proposed issue of municipal bonds, intended by that instrument, meant the vote of two-thirds of the qualified voters present and voting at such election in its favor, as determined by the official return of the result. The words 'qualified voters' as used in the Constitution, must be taken to mean not those qualified and entitled to vote, but those qualified and actually voting. In that connection a voter is one who votes, not one who, although qualified to vote, does not vote." *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. Rep. 539, 28 L. Ed. 517.

Constitutional limitation on indebtedness construed.

758. (Iowa, 1892.) The Constitution of Iowa, article 11, section 3, ordains as follows:

"No county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation—to be ascertained by the last State and county tax lists, previous to the incurring of such indebtedness." Held, "The scope and meaning of this provision of the fundamental and paramount law of the State are clear and unmistakable. No municipal corporation 'shall be allowed' to contract debts beyond the constitutional limit. When that limit has been reached, no debt can be contracted 'in any manner,' or for any purpose. The limit of the aggregate debt of the municipality is fixed at five per cent. of the value of the taxable property within it; and that value is to be ascertained 'by the last State and county tax lists,' which are public records, open to all, and of the contents of which all are bound to take notice. The prohibition is addressed to the legislature, as well as to all municipal boards and officers and to the people, and forbids any and all of them to create, or to give binding force to, any debts of the corporation in excess of the limit prescribed. The prohibition extending to debts contracted 'in any manner, or for any purpose' it mat-

ters not whether they are in every sense new debts, or are debts contracted for the purpose of paying old ones, so long as the aggregate of all debts, old and new, outstanding at one time, and on which the corporation is liable to be sued exceeds the constitutional limit. The power of the legislature in this respect being restricted and controlled by the Constitution, any statute which purports to authorize a municipal corporation to contract debts in any manner or for any purpose whatever in excess of that limit is to that extent unconstitutional and void." *Doon Township v. Cummins*, 142 U. S. 366, 12 Sup. Ct. Rep. 220, 35 L. Ed. 1044.

Agreement of town to exempt property of a corporation from tax, unconstitutional.

759. (S. Car. 1895.) "But can the position assumed—that the property of that company was not liable to taxation by the town of Darlington—be maintained? We are unable to find any provision of the Constitution under which such exemption can be justified. The said property was not used for either municipal, educational, literary, scientific, religious, or charitable purposes, and hence it was, by the express mandate of the organic law, subject to taxation, for the payment of all debts contracted under authority of law." *Town of Darlington v. Atlantic Trust Co.*, 16 C. C. A. 28, 68 Fed. 849.

Issuing bonds in payment of judgment does not create a debt.

760. (Colo. 1897.) "The prohibition of the Constitution of Colorado is against the creation of a debt in excess of the limit there prescribed. If the Parks judgment against the board of county commissioners of Lake county on April 16, 1891, evidenced a valid indebtedness of that county, the issue of the bonds from which the coupons in suit were cut in payment of that judgment was not the creation of a debt, and did not fall under the ban of the Constitution." *Board of Comrs. of Lake County v. Platt*, 25 C. C. A. 87, 79 Fed. 567.

Colorado constitutional debt limitation of counties construed.

761. (Colo. 1897.) *Dudley v. Board of Comrs. of Lake County, Colo.*, 26 C. C. A. 82, 80 Fed. 672.

Statutes conferring legislative functions on judiciary.

762. (Ky. 1898.) A statute of Kentucky made it the duty of the County Court, under certain circumstances, to assess and fix the value of property for taxation. Held, "We think, without further elaboration, that section 20 is unconstitutional and void as an attempt to confer upon a judicial tribunal and a judicial officer a power which is legislative, as the power to assess property for taxation clearly is." *Fleming v. Trowsdale*, 20 C. C. A. 106, 85 Fed. 189.

Statutes conferring on courts legislative functions.

763. (N. Y. 1880.) A statute of New York, requiring the Supreme Court, on petition for that purpose, to determine the question as to the public necessity for the construction of highways, is not repugnant to the Constitution of that State, as conferring upon the courts legislative functions. *Town of Greengburg v. International Trust Co.*, 36 C. C. A. 471, 94 Fed. 755.

Entering yeas and nays on journal.

764. (N. Car. 1899.) The Constitution of North Carolina provided that, "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities, or towns to do so, unless the bill should have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house, respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal." Held, following the decisions of the Supreme Court of North Carolina that, where the journals of the two houses did not show affirmatively that the yeas and nays on the second and third readings of the bill had been entered on said journals, the bill did not become a law.

"The people of the State of North Carolina, in their Constitution, have expressly limited the power of their legislature relating to taxation, and pointed out the certain indispensable prerequisites that must not only exist

as a fact, but also appear on the journals of that legislature in a certain way. The Constitution thus, in plain words, clearly indicates the way and the only way, that the legislature can authorize the counties and the cities of the State to exercise the power of taxation. The entry of the yeas and nays on the last two readings must appear on the journal in order to comply with the requirements of the Constitution, and unless they do so appear the bill has not become a law, and the evidence of its nullity is the journal provided by that Constitution itself." Board of Comrs. of Stanley County, N. Car., et al. v. Coler, et al., 37 C. C. A. 484, 96 Fed. 284.

Refunding indebtedness without vote.

765. (Colo. 1899.) Section 6 of article 11 of the Constitution of Colorado, prohibiting the creation of indebtedness by municipalities of the State without a favorable vote of the electors, does not limit the power of the legislature of that State to empower the municipal and quasi-municipal corporations to refund their debts without a vote of the people. Such refunding creates no indebtedness. Greer v. Board of Comrs. of Ouray County, Colo.; Comrs. of Ouray County v. Greer, 38 C. C. A. 250, 97 Fed. 435.

Constitutional debt limit; computation of amount of indebtedness.

766. (Iowa, 1900.) When bonds are issued in excess of a constitutional limitation, and are therefore void, they are not to be included in computing the indebtedness of the county to determine the validity of indebtedness subsequently incurred by it. Lyon County, Iowa, v. Keene Five-Cent. Sav. Bank of Keene, N. H., et al., 40 C. C. A. 391, 100 Fed. 337.

Constitutional requirement that provision be made for collection of tax to pay bonds and interest; presumption of compliance with; recitals in bonds; bona fide purchaser.

767. (S. Dak. 1894.) The Constitution of South Dakota required that, when bonds should be issued by a public corporation in that State, provision should be made for the collection of an annual tax to pay the interest and principal thereof.

By reason of recitals in bonds, importing full compliance with all provisions and conditions of law, and in

favor of a bona fide holder of such bonds, the constitutional requirement referred to was conclusively presumed to have been complied with, although in fact it had not been. National Life Ins. Co. of Montpelier v. Board of Education of the City of Huron, 10 C. C. A. 637, 62 Fed. 778.

To the same effect: (S. Dak. 1900.) Hughes County v. Livingston, 43 C. C. A. 541, 104 Fed. 306.

Constitutional provision requiring provision to be made at time of creating debt for levying and collecting a sufficient tax to pay the interest and create a sinking fund.

768. (Tex. 1902.) The Constitution of Texas provides that, "no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent. as a sinking fund."

On June 8, 1883, the council of the city of Columbus, Texas, adopted an ordinance providing for issuing \$25,000 00 of bonds and further provided in said ordinance that, "There shall be levied and collected an annual ad valorem city tax of one-fourth of one per centum of the cash value thereof, estimated in lawful money of the United States, on all the movable property and all the real property situated and owned in this city, on the first day of January in each and every year, except so much thereof as may be exempted by the Constitution and laws of the State of Texas, and by ordinances of the city."

Subsequently the council passed another ordinance which was intended to appropriate to the payment of the bonds and interest all the revenues of the city, including poll, occupation and other taxes.

Held, that the bonds were valid to the amount only of the tax provided for contemporaneously with the authorization of the bonds. City of Columbus v. Woonsocket Institution for Savings, 52 C. C. A. 118, 114 Fed. 162.

Impairment of creditors remedies or rights by provision of State Constitution not permitted.

769. (Ky. 1904.) In a proceeding in mandamus to compel the levy and collection of a tax under a law

of Kentucky, to pay a judgment rendered against a county on its bonds, it was contended that a provision of the new Constitution of that State repealed the law theretofore in force which authorized the levy and collection of such taxes and that by reason of such repeal there was no authority to levy and collect such tax. On this question the court say:

"But with respect to this particular law it was impossible that the Constitution should have repealed it. It did not nullify this statute when it declared that statutes inconsistent with it should be void at that time or at some future time unless the Constitution should provide a certain equivalent; and this the Constitution did not do. It supplied no new remedy, and, if the old was not continued, there would have ensued a complete lapse of the obligation of the contract, with a prospect that perhaps some remedy would be supplied by future legislation. With respect to the obligation of a municipality, the substance of its value consists of the means provided for its enforcement; and it is no more possible for the people, by a provision of their Constitution, to impair the obligation of such a contract, than for a legislature of a state." *Guthrie v. Sparks*, 65 C. C. A. 427, 131 Fed. 443.

Constitutional requirements in enacting laws.

770. (Neb. 1907.) This was an action at law on coupons clipped from bonds of school district of Nebraska. It was contended that an amendment of the enabling act was invalid because certain constitutional requirements were not complied with in its enactment.

"The legislative journals, as published by authority, disclose these facts respecting the bill for the act in question: It originated in the House of Representatives, where it was passed by the constitutional majority, the vote being taken by yeas and nays which were entered upon the journal. In the Senate it was amended and passed in its amended form by the requisite majority; the vote being taken and entered as in the House. It was then returned to the House with the request that the amendment be concurred in, but whether this was done, and if so

by what majority, and in what manner the vote was taken, are matters in respect of which the journal of the House is silent. As enrolled under the supervision of the joint committee on enrollment, as signed by the presiding officer of each house, and as presented to and approved by the Governor, the bill embodied the amendment.

"It is insisted that the amendment could only have been concurred in by a vote of the House in which the yeas and nays were taken and entered upon the journal, and that the absence of such an entry renders the act void. Whether or not the insistence is well taken is to be determined by ascertaining what is the proper construction and application of the State Constitution, as settled by the decisions of the court of last resort of the state. *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154; *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204. Turning to the decisions of that court, we find that in *Hull v. Miller*, 4 Neb. 503, it was held that a provision in the State Constitution of 1866, substantially the same as that in section 10, supra, respecting the entry upon the journal of the yeas and nays on the passage of a bill, did not apply to a vote of concurrence by either house in an amendment of the other, but only to the vote taken upon the passage of a bill following its last or third reading in each house, which was treated as the vote on its final passage. And in *State, ex rel. v. Liedtke*, 9 Neb. 400, 4 N. W. 75, which related to an act passed after the adoption of the present Constitution, the court, after observing that 'the words "final passage," as applied to matters of legislation, were well known to the framers of the Constitution, and presumably to the people who adopted it,' held that the requirement of section 11, supra, that 'the bill and all amendments thereto shall be printed before the vote is taken upon its final passage,' does not apply to an amendment proposed by a committee of conference after disagreeing votes in the two houses, but only to amendments proposed before the vote following the last or third reading in each house, which was again treated as the vote on final passage. These decisions show that, under the authoritative

interpretation of the State Constitution a concurrence by one house in an amendment of the other is not the final passage of a bill on which the yeas and nays are required to be taken and entered upon the journal.

"It is next insisted that, though such concurrence be not the final passage of a bill within the meaning of section 10, *supra*, the entire silence of the journal respecting a concurrence by the House renders the act void. But the rule in Nebraska is otherwise, at least in respect of matters like this which are not specially required by the Constitution to be entered upon the journal."

"The validity of the act is also questioned because the bill, after its amendment by the Senate, was not read at large on three different days in each house. But of this it is enough to observe that it is authoritatively settled by the decisions of the Supreme Court of the State that amendments made during the process of enactment do not take from a bill the status obtained by prior readings or make it necessary to begin the readings anew. *Cleland v. Anderson*, 66 Neb. 252, 262, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075; *State v. Liedtke*, 9 Neb. 490, 4 N. W. 63."

"Another objection urged against the act is that it did not pass both houses and receive the approval of the Governor under the same title. The facts bearing upon the objection are these: When the bill was introduced, its title, as is alleged in the

answer of the school district, was that of a bill for 'An act to amend an act entitled "An act to provide for the issuing and payment of school district bonds," approved February 26, A. D. 1879, being subdivision 15 of chapter 79, Revised Statutes.' And such is the title of the enrolled act as authenticated by the presiding officers of the two houses and as approved by the Governor. The journals contain no affirmative statement that the title was at any time changed or amended. Save in one unimportant instance, they identify the bill by the number given to it when it was introduced. In some instances they also give the full title as here set forth, but more frequently, as in the entries reciting its final passage, they designate it as 'A bill for an act to amend an act to provide for the issuing and payment of district bonds.' The objection rests upon the assumption that each form of identification must be accepted as conclusively establishing what the title was at that time. The assumption is not well founded. There is no constitutional or other requirement that the journal entries shall identify the bill to which they relate by a recitation of its title. *State v. Burlington & Missouri River R. R. Co.*, 60 Neb. 741, 748, 84 N. W. 254; *Nelson v. Haywood County*, 91 Tenn. 506, 20 S. W. 1; *Field v. Clark*, 143 U. S. 649, 671, 12 Sup. Ct. 495, 36 L. Ed. 294." *School Dist. No. 11, Dakota County, Neb. v. Chapman et al.*, 82 C. C. A. 35, 152 Fed. 887.

CHAPTER XII.

REMEDIES OF BONDHOLDERS.

- A. Action at law on bonds; action at law for money had and received, or for other breach of contract; limitation of actions.
- B. Bill in equity; to enforce payment of municipal obligations; for reformation of bonds, etc.
- C. Mandamus, an ancillary remedy in federal courts; nature of the writ, extent of remedy for enforcement of municipal obligations.
 - 1. Jurisdiction of federal courts in mandamus ancillary, not original.
 - 2. Nature and office of writ of mandamus; when awarded; to what extent the payment of municipal obligations may be enforced by mandamus.
 - 3. Res adjudicata; to what extent parties are concluded; in mandamus proceedings, by former adjudications.
 - 4. Parties, pleadings, and procedure in mandamus, to enforce payment of municipal obligations.

The rights of holders of municipal bonds must be determined by the rules and considerations recognized and announced in the cases cited in other chapters. Such rights necessarily depend upon the character of the security, the provisions of law relating to their issuance, and the circumstances of their issuance and holding.

The remedies that holders of such securities may have for their collection depend also upon the character of the obligations, and the laws of the States relating to the subject. Generally, when it becomes necessary to enforce the holder's rights by legal proceedings, an action at law to recover a judgment against the corporate body is the proper, and in the Federal courts, the necessary, original action; and after the usual judgment in such action has been obtained, if payment or provision for payment of the judgment is still refused or neglected, a supplementary remedy of mandamus is allowed to compel the proper officers to make such payment, and, if necessary, to make provision for payment by the levy and collection of the necessary tax or assessment, provided, however, that legal authority shall exist for the levying

and collection of such tax or assessment, and that the law enjoins upon the officials sought to be coerced the performance of the duty.

A Federal court, however, will award the writ of mandamus only for the purpose of satisfying a judgment first obtained in that court. In some cases a writ of mandamus may be awarded by a State court, in a proper proceeding, without first obtaining a judgment at law.

When the bonds are not the general obligations of the corporate body issuing them, payable by a general tax, the usual action at law will not always lie, and when such action will not lie the usual remedy is by an original proceeding in mandamus to compel the proper officers to collect or levy and collect, such special taxes or assessments as may be legally levied and collected for their payment, and to pay over the same when so collected; or a suit in equity may, in some cases, be prosecuted to enforce the lien of assessments, if they have been levied.

In some cases where the bonds are not the general obligations of the body whose officials have issued them, but are payable by a special tax, or a tax upon the property of a special district, a modified judgment at law may be obtained recognizing the limitation.

There have been cases in which holders of municipal bonds, for some reason invalid as negotiable securities, have successfully prosecuted actions as for money had and received. This relief, however, will not be given in any case unless money has been received on the bonds and enjoyed by the municipality in making some improvement, or in furtherance of some purpose sanctioned by law, under such circumstances that a legal obligation for the repayment of the money received on the invalid bonds may be implied.

In some cases the courts have administered equitable relief and remedies in furtherance of the rights of municipal creditors under peculiar circumstances, but such cases have been exceptional. Suits in equity have also been entertained for the reformation of imperfectly executed bonds where such imperfection has been technical rather than substantial.

It would be beyond the purpose and scope of this work to discuss the cases, generally, relating to procedure in the pursuit of a bondholder's remedies, but in addition to the cases involving municipal bonds, some others involving remedies of creditors of municipal bodies have been cited in this chapter.

We call attention in this connection to the citations in chapter IX on the subject of taxation and assessments, and to chapter XI for constitutional provisions and principles affecting the rights and remedies of municipal creditors.

A. Action at Law on Bonds; Action at Law for Money Had and Received, or For Other Breach of Contract; Limitation of Actions.

Limitation on interest coupons.

771. (Wis. 1869.) The limitation of actions on interest coupons detached from bonds is the same as that which applies to the bonds. *The City (of Kenosha) v. Lamson*, 9 Wall. 477, 19 L. Ed. 725-730.

On interest coupons; suit not barred except by same lapse of time as would bar suit on bond.

772. (Ky. 1871.) "It is well-settled law that a suit upon a coupon is not barred by the statute of limitations unless the lapse of time is sufficient to bar also a suit upon the bond, as the coupon, if in the usual form, is but a repetition of the contract in respect to the interest, for the period of time therein mentioned, which the bond makes upon the same subject, being given for interest thereafter to become due upon the bond, which interest is parcel of the bond and partakes of its nature and is not barred by lapse of time except for the same period as would bar a suit on the bond to which it was attached." *City of Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809.

Bondholder not limited to remedy provided by state enabling act; may maintain an action at law.

773. (N. Y. 1873.) A statute required "commissioners designated as the agents of the town to report, annually, to the board of supervisors of the county, the amount required to pay the principal and interest on the bonds authorized to be issued, and makes it the duty of the supervisors to assess, levy and collect, of the real and personal property of the town of Queensbury, such sum or sums of money as shall have been reported to them by the commissioners." Held, in an action on interest coupons of such bonds against the town, which denied its liability to pay, that the holder thereof had a right to maintain

an action at law thereon to determine the liability of the town and ascertain the amount due him, and was not confined solely to the remedy provided by the statute.

"These are all directions given to the town and county officers and agents—not to the holders of the bonds and coupons. They prescribe duties to be performed after the amount of the debt due by the town has been ascertained, either by agreement or by judgment. That amount may be contested. It has been in this case. It could only be determined by an action at law. Only after such a determination could the commissioners report how much was required to be levied by taxation. The action, then, does not take the place of any remedy provided by the legislature. At most, it is a step to give effect to the statutory provision." *Town of Queensbury v. Culver*, 19 Wall. 83, 22 L. Ed. 100.

Limitation of action on interest coupons.

774. (Iowa, 1874.) "Coupons, when severed from the bonds to which they were originally attached, are in legal effect equivalent to separate bonds for the different installments of interest. The like action may be brought upon each of them, when they respectively become due, as upon the bond itself when the principal matures; and to each action—to that upon the bond and to each of those upon the coupons—the same limitation must upon principle apply." *Clark v. Iowa City*, 20 Wall. 583, 22 L. Ed. 427.

Unauthorized bonds in payment of valid contract to construct sidewalks; action on the contract.

775. (Tex. 1877.) The mayor and the chairman of the committee on streets and alleys of the city of Galveston, Tex., had been authorized by ordinance to enter into a contract or contracts

with responsible parties, to fill up, grade, curb and pave sidewalks, and entered into a contract for such work, agreeing to pay therefor in bonds of the city. This contract was ratified by the council. The city charter conferred upon the council of the city power "to establish, erect, construct, regulate and keep in repair, bridges, culverts and sewers, sidewalks and crossways, and to regulate the construction and use of the same," and provided for special assessments to be made upon abutting property to pay the cost of construction of sidewalks. The charter further provided that the council should not borrow for general purposes more than \$50,000. The bonds provided for in said contract exceeded this limit.

The action was upon the contract and not upon the bonds. Held, that this limitation was upon the power to borrow money for general purposes only, and is in no sense a limitation on the debt of the city. Held, further, that the purpose indicated in the contract was not a general purpose. Held, also, that, though there was no authority for issuing bonds for the purpose provided in the contract, the city council was authorized to incur an indebtedness for such purpose. Held, also, that said contract was not entirely void, and that the contractor was entitled to recover upon the contract. *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659.

Statute of limitations runs against interest coupons from their maturity.

776. (Iowa, 1878.) "This action is, beyond question, founded upon written contracts. The coupons in suit matured more than ten years prior to its commencement. Upon the nonpayment, at maturity, of each coupon, the holder had a complete cause of action. In other words, he might have instituted his action to recover the amount thereof at their respective maturities. From that date, therefore, the statute commenced to run against them." The fact that they were not detached from the bonds is immaterial. *Amy v. Dubuque*, 98 U. S. 470, 25 L. Ed. 228.

Presentation of coupons before suit unnecessary.

777. (Ala. 1880.) The first question presented was: "1. Whether the de-

murrer to the complaint should have been sustained because it was not averred specially that the coupons sued on were presented to the court of county commissioners for allowance before the suit was brought." Held, that such presentation was unnecessary. *County of Greene v. Daniel*; *County of Pickens v. Daniel*, 102 U. S. 187, 26 L. Ed. 99.

Money paid for invalid bonds, recoverable, when.

778. (Mo. 1880.) The city of Louisiana, having legal authority to issue bonds, issued and sold securities which were invalid, because antedated to avoid compliance with a recent law requiring registration. The purchaser was ignorant of the deception. He offered to return the bonds and demanded repayment of the money paid for them. Held, that he was entitled to recover.

"It is argued, however, that, as the city was only authorized by law to borrow money at a rate of interest not exceeding ten per cent. per annum, the money cannot be recovered back, because a sale of the bonds involved an obligation to pay interest beyond the limited rate, and the borrowing was, therefore, ultra vires. There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending, and consequently no express contract to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other." *Louisiana v. Wood*, 102 U. S. 294, 25 L. Ed. 153.

Recovery for money had and received.

779. (N. Y. 1881.) "The commissioners executed this authority in the form allowed by the statute, namely, by a direct purchase of the stock, with the bonds issued. They might have sold the bonds for money, and paid the money for the stock. Had they done this, the town would have been liable to pay the money borrowed, even if the obligations given for it had

been void. Where the transaction has nothing in it of malum in se, and the parties are not participes criminis in a violation of law, money had and received by one from the other in good faith may be recovered even though the security given therefor be void for some technical defect or illegality." *Draper v. Springport*, 104 U. S. 501, 26 L. Ed. 812.

Action for money had and received, when not maintainable.

780. (Ill. 1885.) Bonds were issued by a city for a legal purpose, but in excess of the constitutional limitation, and were therefore invalid. Held, that there could be no recovery for money had and received.

"But there is no more reason for a recovery on the implied contract to repay the money, than on the express contract found in the bonds. The language of the Constitution is that no city, etc., 'shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property.' It shall not become indebted. Shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose. No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever. If this prohibition is worth anything it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law." *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. Rep. 820, 29 L. Ed. 132.

No recovery as for money had and received in action brought solely for recovery on bonds and coupons.

781. (Tenn. 1888.) In an action to recover on bonds irregularly issued, and therefore held to be illegal, but for a legal purpose, it was contended "that this court should, in any event, hold the town liable as upon non-negotiable bonds or notes, treating the issue of the negotiable bonds as an excess of authority only, and not invalidating the loan, with interest, as

agreed upon. It is a sufficient answer to this proposition to say that this suit is brought solely for a recovery upon the bonds and coupons, and no question growing out of the liability of the town for the subscription to the stock can be inquired into in this suit." *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. Rep. 1111, 32 L. Ed. 85.

Presentation of county bonds and coupons to county commissioners for payment unnecessary.

782. (Nev. 1890.) Held, that the provisions of the statute requiring presentation of claims against a county to the board of commissioners and auditor for allowance and approval did not apply to bonds and coupons issued by the county.

"Those sections, referring to claims and accounts, have application only to unliquidated claims and accounts, and do not apply to bonds and coupons. This question was presented in the case of *County of Greene v. Daniel*, 102 U. S. 187, 104, in which the court observed, speaking of bonds and coupons, that 'the claim was, to all intents and purposes, audited by the court when the bonds were issued.' The validity and amount of the liability were then definitely fixed, and warrants on the treasury given, payable at a future day."

Statute of limitations; legislative recognition of past-due debt.

An act of the legislature providing for registration of overdue interest coupons of a county, and requiring the county treasurer to thereafter pay them from designated funds, was treated as a new provision for their payment, which saved the right of action thereon from the general limitation. *Lincoln County v. Luning*, 133 U. S. 529, 10 Sup. Ct. Rep. 363, 33 L. Ed. 766.

Agreement to make special assessment to pay for street improvement requires valid assessment; city held liable to action.

783. (Pa. 1894.) The city of Harrisburg entered into a contract for paving a street, agreeing to pay for same by making and assigning to the contractor assessments upon abutting property. The contract further provided as follows:

"It is also understood and agreed

that the payments aforesaid provided for shall be paid as follows: First, out of the amount of the assessments paid into the city treasury by the property-owners, and when that fund is exhausted, then the city of Harrisburg will assign to the said the Barber Asphalt Paving Company, the municipal claims assessed and levied upon the properties abutting on and along the said Market street between the points above mentioned, or mark the same of record to the use of the said company, and also permit the use of the corporate name of the said city in any legal proceedings necessary or proper to enforce the collection of the said assessments.

"It is also understood and agreed that the said company shall accept the said assessments in payment of the amount due it under this contract, and the city shall not be otherwise liable under this contract whether the said assessments are collectible or not."

A statute on which the parties relied as authority for making such assessment was held to be invalid, and a large part of the assessments were not paid. In an action by the contractor against the city to recover a balance remaining unpaid, the city was held liable.

"The parties contemplated valid charges on the property. The term 'assessment' clearly implies this; nothing short of a lawful assessment—one capable of enforcement, satisfies it. It was such assessments the plaintiff agreed to accept, and assumed the risk of collecting. The parties were mutually mistaken respecting the authority to pay in the special manner designated; but this does not relieve the defendant from its obligation to pay." *Barber Asphalt Paving Co. v. City of Harrisburg*, 12 C. C. A. 100, 64 Fed. 283.

Failure to make valid special assessments to pay for street improvements as agreed renders municipality liable; same when it agrees that another will pay.

784. (Colo. 1896.) "If a municipal corporation which has the power to make a contract for street improvements contracts for them, and stipulates in the contract that the agreed price of the improvements shall be paid to the contractor out of funds

realized or to be realized by assessments upon abutting property, the city is primarily and absolutely liable to pay the contract price itself, if it has no power to make such assessments, or if the assessments it attempts to make are void. *City of Memphis v. Brown*, 20 Wall. 289, 311, 312; *Hitchcock v. Galveston*, 96 U. S. 341, 350; *Barber Asphalt Paving Co. v. City of Harrisburg*, 12 C. C. A. 100, 64 Fed. 283; *Bucroft v. City of Council Bluffs*, 63 Iowa, 646, 650, 19 N. W. 807; *Scofield v. City of Council Bluffs*, 68 Iowa, 695, 28 N. W. 20; *City of Chicago v. People*, 56 Ill. 327, 333; *Maher v. City of Chicago*, 38 Ill. 266, 273; *Miller v. City of Milwaukee*, 14 Wis. 699; *Fisher v. City of St. Louis*, 44 Mo. 482; *Commercial Nat. Bank v. City of Portland*, 24 Oreg. 188, 33 Pac. 532." *Barber Asphalt Paving Co. v. City of Denver*, 19 C. C. A. 139, 72 Fed. 336.

Though negotiable bonds not authorized, if given for valid indebtedness recovery allowed.

785. (Ga. 1896.) "Conceding there was no power in the defendant to bind its constituency to the payment of commercial securities, as these bonds purport to be, it does not follow that—when such bonds were given in payment of a lawful debt, and the settlement of such debt is shown to have been the purpose for which the bonds were issued, and it is further shown that the mayor, being duly authorized by valid ordinances, signed and delivered the same to the creditor agreeing to take them—the defendant can escape the payment of the debt or obligation which is evidenced by such promises to pay, because, or on the ground that, the city authorities gave negotiable, instead of nonnegotiable, promises to pay to the creditor. On the contrary, when negotiable securities, instead of nonnegotiable instruments, have been employed in settlement of lawful debts, the negotiable bonds so given have, when they were being sued upon, been treated, in a number of reported cases both in Federal and State courts, as evidences of the debt, and on them, in the hands of third parties, recovery has been had against such defendant corporation." *Pacific Improvement Co. v. City of Clarksdale*, 20 C. C. A. 635, 74 Fed. 528.

City liable to contractor for failure to levy and collect assessment.

786. (Wash. 1897.) A city was held liable to a contractor in damages in an action at law for its failure, within a reasonable time after he had performed his part of the contract with the city, to levy and collect special assessments as provided in the contract, to produce a fund for the payment to him of the price stipulated in the contract. That the city made a mistake as to the proper construction of the law and its powers thereunder resulting in such delay did not affect its liability for damages. *Denny v. City of Spokane*, 25 C. C. A. 164, 79 Fed. 719.

Presentation for payment before suit; notice of nonpayment; unnecessary; county warrants.

787. (Kan. 1898.) Presentation of county warrants for payment, or notice of nonpayment, is not necessary to maintain an action thereon, if it appear that the county had not suffered and could not suffer any loss from want of presentment or notice. *Speer v. Board of County Comrs. of Kearney County, Kan.*, 32 C. C. A. 101, 88 Fed. 749.

Action to recover on warrants issued for unlawful purpose; no right to a recovery as for money had and received.

788. (S. Dak. 1899.) In an action against a city on its ordinary city warrants, which, it appeared, were issued for an illegal purpose, it was urged by the holder, a transferee of the original payee, that he was entitled to recover the amount paid for the warrants as for money had and received. Held, "whether there could be such a recovery if the money had been paid into the city treasury, and by the city used for legitimate purposes, it is unnecessary to determine in this case, as the trial judge, in his sixth finding of fact, specially found, 'And the Huron capital commissioners negotiated said warrants, and received and paid out said money obtained by the sale thereof for capital purposes.' This finding brings the case directly within the ruling of the Supreme Court of the State in the case of *Huron Waterworks Co. v. City of Huron*, 7 S. Dak. 9, 62 N. W. 981, 30 L. R. A. 848, which holds, in substance, that the city is not liable for money re-

ceived by its treasurer unless he had a right to receive it, and it was used for legitimate corporate purposes." *Watson v. City of Huron*, 38 C. C. A. 264, 97 Fed. 449.

Unauthorized bonds in aid of non-resident railroad company; action as for money had and received; recovery denied; discussion of principles.

789. (Tenn. 1900.) "The question for our consideration here is, therefore, whether one who, for full value, purchases in the market negotiable bonds payable to bearer, and undorsed, issued by a municipal corporation to a railroad company of another State, to whom it has no power to issue the bonds, in payment of a subscription to the company's stock to which it has no power to make a subscription, after the railroad has been built, and the depot has been constructed on the company's ground, and the certificates for the stock subscribed for have been delivered to the municipal corporation, all in accordance with the condition of the subscription agreement, may recover from the municipal corporation the money paid by it in open market for the bonds, on the ground that that amount has been expended in conferring upon the city the benefit of the railroad and the depot and the stock, when it further appears that the corporation has power to make subscriptions for the stock of a domestic corporation, and to pay for the same in its bonds. We think the question must be answered in the negative. The cause of action is for money had and received to the use of the city. Such an action is based not on an express or implied contract, but on an obligation which the law supplies from the circumstances, because, *ex æquo et bono*, the defendant should pay for the benefit which he has derived at the expense of the plaintiff. It is an obligation which the law supplies because otherwise, it would result in the unjust enrichment of the defendant at the cost of the plaintiff. It is an obligation which arises only when the defendant has received money or property from the plaintiff and appropriated the same to his own use, either when he might have elected not to take it, or, having the power to do so, might return the benefit thus conferred to the plaintiff, and fails to do so. In this case

the three benefits conferred on the plaintiff are: (1) The issuing of the stock; (2) the construction of the railroad; and (3) the building of the depot. As to the first it has been conclusively adjudged by the Supreme Court of Tennessee in the case of *Johnson City v. Charleston C. & C. R. Co.*, 100 Tenn. 138, 44 S. W. 670, in which the plaintiff and the defendants were adversary parties, that the city had no power to subscribe to the stock of the railroad company. This being so, the city did not become a stockholder in the railroad company, and did not receive the benefit of the stock purporting to be issued. The contract of subscription was utterly void, and the certificate was but waste paper. It imposed no obligation upon the railroad company or its stockholders; it conferred no benefit upon the city. The case of *Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. Rep. 831, 42 L. Ed. 198, leaves no doubt on this point. There a national bank, without power to do so under the national banking laws, purchased stock in a savings bank of the State of California. It was held that, in the absence of power to own the stock, the national bank did not become a stockholder, and was not liable to pay the assessment upon the stock for the benefit of creditors, although in that case it had received, and had not returned, dividends issued to it as a stockholder.

The other benefits said to have been conferred upon the city were the construction of the railroad and the building of the depot. As the railroad and the depot were constructed on the land of the railroad company, they did not go into the possession of the city as its property. Had the railroad company, without any subscription by the city, built its railroad through the city, and erected its station there, it certainly could not be claimed that this would have given the railroad company a right of action against the city for the value of the benefits conferred on the city by such construction, however great those benefits might have been in adding to the prosperity of the city and its inhabitants. In the absence of an express agree-

ment to pay for such a benefit, no tacit agreement to do so can be inferred. Where the conferring of the benefits was induced by an express agreement which is void, the law will not supply an obligation to pay on the ground of unjust enrichment as a quasi-contract, unless, in the absence of the express agreement, a real, but tacit, contract could have been inferred from the circumstances. The benefit indirectly conferred on one man's property by the improvement of the land of another is not an unjust enrichment of the other. Hence, *ex æquo et bono*, no obligation in law to pay it arises.

A number of cases reviewed and distinguished. *Travelers' Ins. Co. v. Mayor, etc.*, 40 C. C. A. 58, 99 Fed. 663.

Limitation of action runs from repudiation of obligation; against county warrants from time county has provided for payment.

789a. (Kan. 1903.) "This court also held in the case of *Greer v. School District*, 49 C. C. A. 539, 548, 549, 111 Fed. 691, that where a municipality issued void bonds, receiving the money therefor, and subsequently paid interest thereon, the statute of limitations would not begin to run against a bill to rescind the transaction, or against an action brought to recover the money, until the municipality had repudiated its void obligations; and in the case at bar it does not appear that Kearny county repudiated its refunding bonds more than five years before these actions were commenced to rescind the transaction and recover the sum due on the warrants. Moreover, it is held in the *State of Kansas (School District v. Bank*, 63 Kan. 668, 66 Pac. 630) that the statute of limitations does not begin to run against county warrants until the county has provided a fund for their payment, and no such fund was ever provided to pay the warrants which are the subject of controversy in these actions." *Board of Comrs. of Kearny County, Kan., v. Irvine*, 61 C. C. A. 607, 126 Fed. 689.

Jurisdiction sustained; action held to be at law and not in the nature of an application for a writ of mandamus.

790. (Cal. 1899.) In an action in a United States Circuit Court against a city on its bonds, it was urged that the court had no jurisdiction, for the reason that the action was "substantially a proceeding in the nature of an application for a writ of mandamus to compel the officers of the city to perform the duty of levying and collecting the necessary taxes for the payment of the bonds which, without the issuance of such writ and judgment in favor of the plaintiff, could not be enforced." Held, that it was an action at law and that the court had jurisdiction. *City of Santa Cruz v. Waite*, 39 C. C. A. 106, 98 Fed. 387.

Presentation of bonds and coupons at place of payment before suit unnecessary.

791. (S. Dak. 1900.) "The fact that the bonds and coupons were not presented for payment at the bank in New York where by their terms they were payable was immaterial. There was no claim that the county had ever paid them, or endeavored to pay them; no claim that it had ever placed the money at the bank in New York to be applied to their payment. In this state of the case, the plaintiff was not required to go through the useless ceremony of presenting his coupons where there was nothing to pay them before he commenced his suit for the default of the county. The fact that coupons are made payable at a particular place does not make a presentation for payment at that place necessary before an action can be maintained upon them." *Hughes County, S. Dak., v. Livingston*, 43 C. C. A. 541, 104 Fed. 306.

Statute of limitation held to run from repudiation of invalid bonds.

792. (Colo. 1901.) Bonds intended to evidence a debt of a school district, but which were void, were issued July 1, 1892; interest was paid January 1 and July 1, 1893; a special tax was levied for the purpose of paying the interest coupons maturing during the years 1894, 1895 and 1896; that tax

remained a lien and charge upon the taxable property in the district until after suit was instituted on the interest coupons in November, 1897; during those years the district repeatedly promised to pay the coupons representing the interest for the years from 1894 to 1897; the present suit was instituted April 16, 1900; the plaintiff had no intimation that the district intended to repudiate its obligation until its answer in this suit was actually filed, repudiating the same and pleading the statute of limitations. Held, that the plaintiff could maintain an action to recover upon the implied obligation at any time within six years after the district repudiated the express promise contained in the bonds and coupons. A number of authorities cited. *Gear v. School District*, 111 Fed. 682, 49 C. C. A. 539.

Recovery for money loaned when bonds are void.

793. (Colo. 1901.) "We think the case under consideration has now been reduced to about the following proposition: Can the school district, which had ample power to create a general indebtedness for the purpose of erecting schoolhouses, which exercised the power, by voting at an election duly called, to create such indebtedness in the sum of \$10,000, which borrowed the money for the purpose of erecting, and with the money so borrowed actually erected, the schoolhouse, which it has ever since used and enjoyed, escape payment of the same because, forsooth, it persuaded the lender to unwittingly accept void bonds therefor? In our opinion, it can not. Any other conclusion would be a sad commentary on the efficiency of courts of justice to do justice. The authorities, in our opinion, fully sustain this conclusion." Authorities reviewed. *Gear v. School District*, 111 Fed. 682, 49 C. C. A. 539.

Statutory limitation applied to bonded indebtedness only.

794. (Colo. 1901.) A statute of Colorado provided that "in no case shall the aggregate amount of bonded indebtedness of any school district exceed three and one-half per cent. of

the assessed value of the property of such district." Held, that this limitation applied only to bonded indebtedness and not to indebtedness otherwise contracted for building school-houses, to be liquidated by concurrent taxation. *Gear v. School District*, 111 Fed. 882, 49 C. C. A. 539.

Extent of recovery in case of repudiation.

795. (Neb. 1901.) Where a county issued its obligations in the form of negotiable bonds, payable from annual levies of taxes at a definite rate, and the county, after continuing for a number of years to make such levies and to apply the proceeds to the payment of the obligations, repudiated the obligations and refused to make further levies or payments, a holder of the obligations cannot maintain an action at law to recover a judgment against the county for the full amount of the obligations and interest, but may recover only for the amounts then due according to the terms of the obligation. *Washington County v. Williams*, 111 Fed. 801, 49 C. C. A. 621.

Suit maintained against city and county on bonds payable from a fund provided by a special tax.

790. (Cal. 1902.) Bonds were issued by the city and county of San Francisco under an act which authorized the widening of a street in the city of San Francisco and the payment of damages, costs and expenses thereof, to be paid by "bonds of the city and county of San Francisco."

For the payment of the bonds and interest the act authorized a special tax upon the lands which shall be found to be benefited by the improvement. The act further provided that the city and county should not be liable for the payment of the debt. Held, that an action might be maintained against the city and county to be paid from the special fund.

Owners of property taxable not necessary parties.

"We do not think the complainant in such a bill is required to bring into the suit any other defendant than the obligor on the bonds. The cause of suit is against the maker of the instrument on which the suit is brought,

not against the taxpayers whose property may be taxed to pay the same. In a suit against a municipal corporation the inhabitants are not parties, and cannot be made parties, although their property may be taken to satisfy the judgment against the corporation." *Mather v. City and County of San Francisco*, 52 C. C. A. 631, 115 Fed. 37.

Limitation of action on coupons runs from their maturity.

797. (Cal. 1902.) By the statute of limitations of California, actions on written instruments are barred after four years. All the coupons in this suit matured more than four years before suit was commenced and action on them was barred. *Mather v. City and County of San Francisco*, 52 C. C. A. 631, 115 Fed. 37.

Action by owner of part of entire issue may be maintained to enforce payment.

798. (Cal. 1902.) In this case the defendant contended that a holder of bonds less than the entire issue could not maintain an action to enforce their payment for the reason that separate suits by different holders would be unnecessarily harassing. Held, that such action was maintainable. *Perris Irrigation Dist. v. Thompson*, 54 C. C. A. 336, 116 Fed. 832.

Action on a former judgment may be maintained.

800. (Colo. 1908.) "This was a suit in two counts: One to recover the amount of a former judgment rendered by the court below in favor of the plaintiff, Hickman, against the town of Fletcher, the defendant below, and the other to recover the amount due on coupons detached from sixty-nine certain bonds issued by the town of Fletcher and belonging to plaintiff, Hickman. The Circuit Court directed a verdict and rendered a judgment for the plaintiff on both counts, and this writ of error is to secure a review of that action.

"It is first objected that a suit does not lie on a judgment as long as the holder can enforce it by execution issued thereon in due and usual course. It is said that to permit a second judgment at the pleasure of the judg-

ment creditor is unnecessarily harassing and vexatious to the judgment debtor. This view finds support in a few cases, but the general and almost universal rule is otherwise. 2 Freeman on Judgments, 432; 2 Black on Judgments, 958, and cases cited; *Gaines v. Miller*, 111 U. S. 395, 4 Sup. Ct. 426, 28 L. Ed. 406; *Hickman v. Macon County* (C. C.) 42 Fed. 759. The right to enforce payment of a judgment by process of execution is merely cumulative. The obligation of the judgment debtor is to pay the judgment when rendered. If he fails to perform the obligation, no reason is perceived why the judgment creditor may not resort to the courts of the land to enforce it. If the judgment debtor desired to escape the vexation and annoyances of successive suits, it is pertinent to suggest that he had it in his power to do so, and at the same time save his creditor from greater vexation and annoyance, by discharging his obligation and paying his debt when due. There was no error in directing a verdict on the first count." *Town of Fletcher v. Hickman*, 91 C. C. A. 353, 165 Fed. 403.

When action may be maintained to recover money loaned on securities illegally issued.

801. (Mich. 1914.) "The Michigan Constitution of 1850, in force until 1909, provided as follows:

"Each organized county shall be a body corporate, with such powers and immunities as shall be established by law." Article 10, section 1.

"A board of supervisors, consisting of one from each organized township, shall be established in each county, with such powers as shall be prescribed by law." Article 10, section 6.

"The board of supervisors of any county may borrow or raise by tax \$1,000 for constructing or repairing public buildings, highways or bridges; but no greater sum shall be borrowed or raised by tax for such purpose in any one year, unless authorized by a majority of the electors of such county voting thereon." Article 10, section 9.

"The Michigan statutes regarding counties and boards of supervisors, after imposing upon the counties the duty of providing suitable court houses and keeping the same in repair, confer

upon boards of supervisors the following powers, among others:

"Sixth. To cause to be erected the necessary buildings for poor houses, jails, clerks' offices, and other county buildings, and to prescribe the time and manner of erecting the same."

"Seventh. To borrow or raise by tax upon such county any sums of money necessary for any of the purposes mentioned in this act: Provided, that no greater sum than one thousand dollars shall be borrowed or raised by tax in any one year, for the purpose of constructing or repairing public buildings, highways, or bridges, unless authorized by a majority of the electors of such county voting therefor as hereinafter provided." Section 2484, C. L. Mich 1897."

A county borrowed \$30,000—to complete a court house, without being authorized by vote of the electors of the county.

An action was prosecuted against the county for the recovery of plaintiff's money had and received by defendant and used for its benefit.

"In support of a right to recover in this case, plaintiff relies on Supreme Court decisions, of which *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153, is the leading case, and on the decision of this court in *Chelsea Bank v. Ironwood*, 130 Fed. 410, 412, 66 C. C. A. 230, 232. In the opinion in the latter case, by Judge Richards, the principle of distinction is very clearly put. He says:

"This is a case for the application of the settled rule that a city may be compelled to pay back money which it has received for bonds illegally issued, when the purpose of the loan was lawful, and the creation of the debt not prohibited by law (*Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659; *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Parkersburg v. Brown*, 103 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Chapman v. Douglass County*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; *Read v. City of Plattsburgh*, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414; *Logan County Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107; *Aldrich v. Chemical National Bank*, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611), and does not come

within the exception exempting a city from liability where it has never received the benefit of the money, or the loan itself was in excess of its authority to create a debt (*Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132; *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. 71 37 L. Ed. 1044). This court has applied both the rule and the exception—the former in the cases of *City of Gladstone v. Throop*, 71 Fed. 341, 18 C. C. A. 61, and *Andrews v. Youngstown*, 86 Fed. 585, 596, 30 C. C. A. 203, and the latter in the case of *Travelers' Ins. Co. v. Johnson City*, 99 Fed. 663, 40 C. C. A. 58, 49 L. R. A. 123. In the last case mentioned there is a careful review of the authorities up to that time.

"Further study of the very numerous decisions now reviewed in the briefs of counsel suggests no occasion to modify this statement; and it only remains to determine whether the present case is within the rule or within the exception as stated by Judge Richards." *Eaton v. Shiawassee County*, 134 C. C. A. 316, 218 Fed. 588.

Temporary loans in anticipation of current tax collections.

802. (Mass. 1909.) This was an action at law to recover the amount due on promissory notes of the city of Newburyport, which had been issued in accordance with section 6, c. 27 of the Revised Laws of Massachusetts, as follows:

"Sec. Cities and towns may by a majority vote incur debts for temporary loans in anticipation of the taxes of the municipal year in which such debts are incurred, and expressly made payable therefrom by such vote. Such loans shall be payable within one year after the date of their incurrence, and shall not be reckoned in determining the authorized limit of indebtedness."

Commercial paper governed by law merchant; local laws not always applicable.

"The statute of the United States on this topic is found in section 721 of the Revised Statutes (U. S. Comp. St. 1901, p. 581), to the effect that the

laws of the several States shall be regarded as rules of decision in trials at common law in the courts of the United States 'in cases where they apply.' It has long been held by the Supreme Court that special local laws do not apply to all phases of commercial paper in the hands of innocent bona fide holders; and the reason for this is plain. Commercial paper is governed by the law merchant, and the law merchant is a part of the private international law; and, commercial paper being intended to circulate into the hands of citizens of different States and nonresidents, it is not always possible to apply peculiar local law with justice."

Authority to issue securities; determination by officials as to conditions; notice of records.

"The defendant admits that it is clearly established by many cases in the Federal courts that, when the authority of a municipality to issue bonds or notes is made conditional on the existence of certain facts, and where the legislature or the city council has, expressly or by implication, authorized certain officers to determine whether those facts exist, their recitals that the facts do exist are conclusive in favor of bona fide purchasers. In the earlier cases in the Supreme Court reliance was evidently placed very largely on express authority of the kind just referred to. As, for example, it was said that, where certain officers were authorized to canvass votes at a certain election preliminary to issuing bonds, their canvass, and their certificate in due form of the result, were effectual. But, going on from one period to another, the Supreme Court has been more and more prone to recognize an implied authority in this direction. Yet the practice in this particular has not gone beyond what natural justice requires. It is within the power of municipal corporations, by establishing an independent registry or otherwise, to protect themselves almost absolutely against overissues by its own officers. Here there was no such independent registry, and no method by which the purchaser of the notes of the city could ascertain with certainty whether there was any overissue,

either as to the extent of the loan which the statute authorizes in anticipation of taxes, or with respect to the gross amount of the notes which the statute permitted. The effect of such a registry, if duly established, is shown in *Merchants' Bank v. Bergen County*, 115 U. S. 384, 301, 302, 6 Sup. Ct. 88, 29 L. Ed. 430, where there were no recitals but there was an independent public record of the county open to inspection."

Federal court has jurisdiction.

"The jurisdictional inhibition of act of August 13 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), does not reach notes payable to bearer and made by a corporation; and these notes were payable to bearer by the law merchant, and were made by a corporation; that is, the city of Newburyport. *Lake County v. Dudley*, 173 U. S. 243, 250, 19 Sup. Ct. 308, 43 L. Ed. 684. The exception from the inhibition of the statute is not limited by any of its terms to a case where the notes are first negotiated to a citizen of a State other than the State of which the quasi-corporation is a citizen; and, by the very nature of the statutory provision on this particular point, it could not be, because, if it were, it would be mere surplusage. On the whole, the settled practice of the Federal courts is against the contention of the city on this proposition as to the jurisdiction of the Circuit Court."

Recitals in bonds and certificates accompanying same; same effect.

"In *Davies County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026, relied on by the defendant, there was only a certificate by a judge of the County Court indorsed on the back of each bond, as to which the opinion said, at page 664 of 117 U. S., at page 901 of 6 Sup. Ct. (29 L. Ed. 1026), that neither the statute nor the vote

of the people nor the order of the County Court empowered him to make it, or even to determine whether the county had exceeded the power conferred upon it. The opinion added: 'An officer's certificate of a fact which he has no authority to determine is of no legal effect.' However, we have no occasion to refer in this connection to any decision except that of *Presidio County v. Noel-Young Bond & Stock Company*, 212 U. S. 58, 29 Sup. Ct. 237, 53 L. Ed. 402, which we have already cited as the last pronouncement on this topic. There the amounts sold were excessive. Although, under the statute, the County Commissioners Court was to determine the amount of the loan, 'the act provided that the bonds should be signed by the county judge, countersigned by the county clerk, and registered by the county treasurer, before being delivered.' It contained no provision giving authenticity to the signatures of these officers, or providing that they should certify the facts in reference to the amount of the issue, or make any certificate whatever. Yet their signatures were held to be conclusive in favor of innocent purchasers of the bonds. We are unable to determine, in this essential matter of the form of an express or implied authority in favor of a recital, between that case and the case at bar, where the city treasurer was authorized to negotiate the notes in connection with the mayor, and where the notes themselves were signed, as we have shown, by both the city treasurer and the mayor, and were accompanied with a vote of the city council fixing a limit to the issue, and by a certificate of the treasurer that it had not been exceeded, the whole accompanying the note, and constituting, when negotiated, but a single paper or instrument." *Citizens' Savings Bank v. City of Newburyport*, 95 C. C. A. 232, 169 Fed. 766.

B. Bill in Equity; To Enforce Payment of Municipal Obligations; For Reformation of Bonds, etc.

Appropriate remedy.

803. (Iowa, 1867.) *Mandamus* and not a bill in equity is the proper remedy to compel the levy of a tax for the payment of a judgment against a city. *Walkley v. City of Muscatine*, 6 Wall. 481, 18 L. Ed. 930.

Equitable relief when two corporations are liable.

804. (Wis. 1868.) The city of Beloit was carved out of a portion of the territory which had constituted the town of Beloit. The charter of the city provided:

"All principal and interest upon all bonds which have heretofore been issued by the town of Beloit, * * * shall be paid when the same or any portion thereof shall fall due, by the city and town of Beloit, in the same proportions as if said town and city were not dissolved. And in case either town or city shall pay more than their just and equal portion of the same at any time, the other party shall be liable therefor." Held, that in the enforcement of his claim a holder of such bonds was not confined to his legal remedy by mandamus, but that a bill in equity would lie to ascertain the amount that should be paid by the city and town respectively, and to enforce payment by each. *Morgan v. Beloit City and Town*, 7 Wall. 613, 19 L. Ed. 203, 508.

Futility of mandamus no ground for equitable relief.

805. (Wis. 1873.) "The appropriate remedy of the plaintiff was and is a writ of mandamus. This may be repeated as often as the occasion requires. It is a judicial writ, a part of a recognized course of legal proceedings. In the present case it has been thus far unavailing, and the prospect of its future success is, perhaps, not flattering. However this may be, we are aware of no authority in this court to appoint its own officer to execute the duty thus neglected by the city in a case like the present." A lengthy discussion of the question. *Supervisors v. Rogers*, 7 Wall. 175, distinguished. *Rees v. City of Watertown*, 19 Wall. 107, 22 L. Ed. 72; *Heine v. Levee Comrs.*, 19 Wall. 655, 22 L. Ed. 223.

Rights of creditors on dissolution of municipal corporation.

806. (Tenn. 1880.) In a cause in equity in which complainants, judgment creditors of the city of Memphis whose charter had been repealed by the legislature, prayed that a receiver be appointed to take charge of the assets of the city including her tax books and bills for past due and imposed taxes, and that he be clothed with the power conferred by statutes of Tennessee relied upon, the court held, on consideration of said statutes:

"1. Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire-engines, hose and

hose-carriages, engine-houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation. Upon the repeal of the charter of the city, such property passed under the immediate control of the State, the power once delegated to the city in that behalf having been withdrawn.

"2. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation. The doctrine of some of the States, that such property can be reached directly on execution against the municipality, has not been generally accepted.

"3. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature.

"4. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be collected through the instrumentality of a court of chancery at the instance of the creditors of the city. Such taxes can only be collected under authority from the legislature. If no such authority exists, the remedy is by appeal to the legislature, which alone can grant relief.

"5. The receiver and back-tax collector appointed under the authority of the act of March 13, 1879, is a public officer, clothed with authority from the legislature for the collection of the taxes levied before the repeal of the charter. The funds collected by him from taxes levied under judicial direction cannot be appropriated to any other uses than those for which they were raised. He, as well as any other agent of the State charged with the duty of their collection, can be compelled by appropriate judicial orders to proceed with the collection of such taxes by sale of property or by suit or in any other way authorized by law, and to apply the proceeds upon the judgments."

An extended discussion will be found in the opinion. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197.

Specific performance by delivery of bonds or payment of money.

807. (Ala. 1880.) The designated officers having bound the county by the contract with the contractors for a public work, "the contractors are entitled to the bonds stipulated, or their equivalent in money. If for any cause, the repeal of the law creating the harbor board, or the refusal of its members or other officials to act, the contract cannot be specifically enforced, a court of equity will order compensation in damages from the party ultimately liable. That court will free the case from all technical embarrassments, to the end that justice may be done to those who have trusted to the law, and the responsibility of parties receiving benefits under it. The case here is not different in principle from the ordinary case of a party being unable to comply with his contract when specific performance is demanded. If, for example, there be a contract for the purchase of land with which the purchaser has complied, but in which the vendor has failed, a court of equity will take jurisdiction; and if it be seen that the vendor, from subsequent sales or otherwise, cannot comply with a decree for a specific performance, the court will adjudge compensation in damages. So here, the court will grant the relief which the complainants, under their contracts, are entitled to have, if such relief can be obtained from the county; but if by reason of intervening obstacles since the contract was made whether arising from laches or default of its officials or repealing legislation, this cannot be secured, an alternative and compensatory decree, that is, one for a money equivalent in the form of damages, will be directed." *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 283.

Equitable relief when bonds are void.

808. (W. Va. 1882.) The city of Parkersburg issued its bonds under an unconstitutional act of the legislature which purported to authorize their issuance to encourage and aid in the establishment of manufacturing concerns. In pursuance of the terms of said act, the city loaned its bonds to O'Brien & Bro., a manufacturing firm, taking mortgage security from the O'Briens for the payment by them of the principal and interest of the bonds. O'Briens sold the bonds and used the

proceeds in improving and equipping their manufacturing plant, the property mortgaged to the city, and in running their business. After a time the O'Briens failed. In a suit in equity by holders of the bonds against the city the O'Briens and others,—Held, that the holders were entitled to have the mortgaged property subjected to the payment of their bonds, and that they and the city respectively were entitled to an accounting for rents, outlays, etc. *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. Rep. 442, 27 L. Ed. 238.

Reformation of bonds having no seal affixed.

809. (N. J. 1883.) Suit in equity for the reformation of township bonds to which no seal had been affixed, and to enjoin the township from setting up as a defense the want of such seal.

"It was contended in behalf of the township that the bonds were void: First. Because they were not under the seals of the commissioners, as required by the statute. Second. Because the statute did not authorize the issue of bonds with annexed and detachable coupons not under seal. Third. Because the consent of the taxpayers to the borrowing of money and issue of the bonds was obtained by fraud. Fourth. Because the consent of a majority of all the taxpayers, as well as of those who represented a majority of the landed property of the township, was not obtained before the subscription for stock and the issue of the bonds. Fifth. Because the bonds were issued by the commissioners directly to the railroad corporation in exchange for stock, instead of being sold or disposed of by the commissioners and the money thus obtained applied to the purchase of stock, as required by the statute.

"In dealing with these objections, it must be borne in mind that the cases before us are not actions at law upon the bonds or coupons but bills in equity to restrain the township from setting up the want of seals in the actions at law heretofore brought by those plaintiffs against the township to recover the amount of the coupons; and the objections above recited are to be considered so far only as they affect the question whether the bill can be maintained.

"It has been settled, upon fundamental principles of equity jurispru-

dence, by many precedents of high authority, that when the seal of a party, required to make an instrument valid and effectual at law, has been omitted by accident or mistake, a court of chancery, in order to carry out his intention, will, at the suit of those who are justly and equitably entitled to the benefit of the instrument, adjudge it to be as valid as if it had been sealed, and will grant relief accordingly, either by compelling the seal to be affixed, or by restraining the setting up of the want of it to defeat a recovery at law.

"It was argued that the power conferred upon the commissioners to issue bonds was a statutory power, defects in the execution of which could not be supplied or relieved against in equity. There is much learning on this subject in the books. But, Mr. Chance, upon a full review of the older cases, has clearly demonstrated that the true ground upon which equity grants relief is 'the same as that on which it relieves against the want of livery, the want of enrolment, or any other ceremony required, either at common law or by statute, but considered as not meant to be positively essential. The main point to be ascertained, at least with reference to forms prescribed by act of Parliament, is whether the legislature has attached a decisive weight to the observance of the forms.'"

"The bonds are in other respects in the form prescribed by the statute. The commissioners intended to issue them in behalf of the town, pursuant to the statute, and stated on the face of the bonds that they had done so, and that they had thereto set their hands and seals. The town received full consideration for the bonds, and the purchaser bought them in open market, in good faith and for value, and in ignorance of the want of seals. These facts present a strong case for the interposition of a court of equity, having jurisdiction of the cause and of the parties, to prevent the formal defect of the want of the seals of the commissioners from being set up to defeat an action at law upon the bonds or coupons. The mere fact that the purchasers, at the time of their purchase, did not observe the omission of seals upon securities having in all other respects the appearance of municipal bonds, is not such negli-

gence as should prevent them from applying to a court of equity to correct a mistake of this character." Held, that plaintiffs could maintain the bills and were entitled to the relief prayed for. *Bernards Township v. Stebbins*; *Same v. Morrison*, 109 U. S. 341, 3 Sup. Ct. Rep. 252, 27 L. Ed. 956.

810. Holder of void bonds has no lien on city water works in which proceeds of bonds were expended by the city.

The reasons for this holding discussed at some length. *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. Rep. 820, 29 L. Ed. 132.

No equitable remedy, when.

811. (Ill. 1885.) Ballou being the owner of bonds, issued by the city of Litchfield to raise means to construct water works, which were invalid because in excess of the constitutional limitation on such indebtedness, brought suit in equity alleging that the proceeds of the bonds had been used by the city in the construction of the water works and praying for a decree against the city for the amount of his claim, and that, if not paid within a reasonable time, the water works be sold to satisfy the decree, on the ground that though the bonds are void the city was bound *ex æquo et bono* to return the money it received for them. Held, that the suit could not be maintained.

There are two objections to this proposition: "1. If the city is liable for this money an action at law is the appropriate remedy. The action for money had and received to plaintiffs' use is the usual and adequate remedy in such cases where the claim is well founded, and the judgment at law would be the exact equivalent of what is prayed for in this bill, namely, a decree for the amount against the city, to be paid within the time fixed by it for ulterior proceedings. In this view the present bill fails for want of equitable jurisdiction.

"2. But there is no more reason for a recovery on the implied contract to repay the money, than on the express contract found in the bonds." *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. Rep. 820, 29 L. Ed. 132.

No equitable remedy because state officers fail to perform their duty.

812. (Ky. 1885.) A bill in equity alleged the recovery of a judgment on

bonds issued to pay for subscription to the stock of a railroad company, the issue and return of an execution "no property found," the issuance of writs of mandamus directing the levy of a tax to pay the judgment, the levying of such tax, the failure to collect same on account of the hostility of the citizens, and inability to find any one who would perform the duty of collector. The bill prayed for the appointment of a receiver who should collect such taxes to be applied to the payment of the judgment. The county answered admitting recovery of the judgment, the issue and return of execution, the issue of the writs of mandamus, and the levy of the taxes, and the refusal of the officers of the county to collect the taxes, but denied everything else. The questions presented and decided were:

"1. Whether taxes levied under judicial direction can be collected through a receiver appointed by the Court of Chancery, if there is no public officer with authority from the legislature to perform the duty.

"2. Whether taxes levied by State officers under judicial direction can be collected through a receiver appointed by the United States court, where the legislature has provided an officer to collect, but there is a vacancy in office and no one can be found who is willing to accept the office.

"3. Whether a court of chancery can grant any relief to complainant upon the facts recited in the bill, answer and stipulation, as presented in this record." Held, that the remedy prayed for was not within the power of the court.

A number of cases reviewed and principles discussed. *Thompson v. Allen County*, 115 U. S. 550, 6 Sup. Ct. Rep. 140, 29 L. Ed. 472.

Holder's remedy when bonds invalid.

813. (Tenn. 1886.) Bonds issued by a county in payment of a subscription by the county to the stock of a railroad company were held to be void for want of authority in the county officers to issue them. As to other remedy than action on the bonds the court say:

"The original invalidity of the acts of the commissioners has never been subsequently cured. It may be, as alleged, that the stock of the railroad company, for which they sub-

scribed, is still held by the county. If so, the county may, by proper proceedings, be required to surrender it to the company, or to pay its value; for, independently of all restrictions upon municipal corporations, there is a rule of justice that must control them as it controls individuals. If they obtain the property of others without right, they must return it to the true owners, or pay for its value. But questions of that nature do not arise in this case. Here it is simply a question as to the validity of the bonds in suit." *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. Ed. 178.

Equitable remedy by subrogation.

814. (Ill. 1888.) "The bonds in question in this suit were delivered by the agents of the town of Middleport to the railroad company, and by that company sold in open market as negotiable instruments to the complainant in this action. There was no indorsement, nor is there any allegation in the bill that there was any express agreement that the sale of these bonds carried with them any obligation which the company might have had to enforce the appropriation voted by the town. Notwithstanding the averment in the bill that the intent of complainant in purchasing said bonds, and paying its money therefor, was to acquire such rights of subrogation, it cannot be received as any sufficient allegation that there was a valid contract to that effect. On the contrary, the bill fairly presents the idea that by reason of the facts of the sale the complainant was in equity subrogated to said rights, and entitled to enforce the same against the town of Middleport."

"The whole transaction of the execution and delivery of these bonds was utterly void, because there was no authority in the town to borrow money or to execute bonds for the payment of the sum voted to the railroad company. They conferred no right upon anybody, and of course the transaction by which they were passed by that company to complainant could create no obligation, legal or implied, on the part of the town to pay that sum to any holder of these bonds."

"One of the principles lying at the foundation of subrogation in equity,

in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor."

An extended discussion in the opinion. *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. Rep. 625, 31 L. Ed. 537.

Equity cannot enforce payment of part of total issue of bonds which are invalid because in excess of legal limit.

§15. (Nebr. 1893.) Holders of bonds, issued by a county in excess of its authority cannot, by an offer to surrender and cancel so much of such bonds as may upon inquiry be found to exceed the limit authorized by law, invest a court of equity with jurisdiction to ascertain the amount of such excess, and declare the residue of the bonds valid and enforce their payment against the county. *Louisiana v. Wood*, 102 U. S. 294; *Read v. Plattsmouth*, 107 id. 568; *Davies County v. Dickenson*, 117 id. 657, distinguished.

"Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident, or mistake to so modify it as to make it legal and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction, or the contract, is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof." *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. Rep. 71, 37 L. Ed. 1044.

Reformation by court of equity of invalid contract of county.

§16. (Tex. 1897.) "The contract entered into between the appellee and Brazoria county being void because, in the attempt to create the debt evidenced thereby, the express provisions of section 7, art. 11, of the Constitution were ignored and violated, and

there being no evidence in the record of accident or mutual mistake on the part of either of the parties in the execution of the contract, it cannot be seriously claimed that a court of equity has the power to reform the instrument, and infuse into it constitutional force and vigor." Citing *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. Rep. 74. *Wade v. Travis County, Tex.*, 28 C. C. A. 589, 81 Fed. 742.

But see *Wade v. Travis County*, 174 U. S. 499, 19 Sup. Ct. Rep. 715, 43 L. Ed. 1060, reversing the decision in this case.

Equitable subrogation.

§17. (Iowa, 1898.) Invalid bonds of a county were voluntarily paid by the county from the proceeds of other invalid bonds which were subsequently repudiated by the county. Held, that no equities thereby arose in favor of the holders of the latter issue of bonds entitling them to subrogation to equities of the holders of the former bonds so paid off. *Lyons County v. Ashuelot Nat. Bank of Keene, N. H.*, 30 C. C. A. 582, 87 Fed. 137.

Bill in equity to require city to account; special assessments for street improvements, held a trust fund; misappropriation of funds.

§18. (Iowa, 1900.) By a bill in equity it was averred in substance that the complainant was the owner of district improvement bonds, part of a large amount of similar bonds issued by the city of Sioux City for the improvement of streets, and for the payment of which special assessments had been levied upon property abutting upon the streets improved; that as collections of such assessments had been made, the proceeds had been improperly applied by the city to the payment of such bonds regardless of its duty to apply them to the payment of the particular bonds on account of which the particular assessments had been made; that through the misconduct of the city in this and other ways alleged in the bill, the sinking fund provided for in the act of the general assembly has been depleted and misapplied; that there now remains in the city treasury an aggregate of \$28,983.98, received and collected from the special assessments levied on the property abutting on the several streets and alleys and portions

thereof upon which improvements had been made under the resolutions of the city council adopted from time to time, and that owing to these facts and others stated equity can alone be done by holding the money now in the treasury and other amounts that may be collected as a common trust fund for the benefit of all the holders of such bonds. The bill prayed that a proper accounting be had and for other equitable relief. A demurrer was interposed to the bill by the city on the ground that the complainant had sufficient remedy at law in an action against the city on the bonds. Held, that the bill presented a case properly cognizable by a court of equity; that the city was charged with the duty of levying and collecting the assessments and making proper payment thereof to bondholders, which duty amounted to a trust, and that the bondholders had the right to call the city to account for the manner in which that trust had been performed. *Vickrey v. City of Sioux City et al.*, — C. C. A. —, 104 Fed. 164.

Bill in equity to enforce collection of assessment after consolidation of cities.

819. (Iowa, 1901.) The city of Lyons was annexed to the city of Clinton, in pursuance of a law of Iowa, which did not impose upon the city of Clinton a legal liability for the indebtedness owing by the city of Lyons which would authorize the court to render a judgment thereon against the city of Clinton.

"This section does confer upon the city of Clinton the power and duty to impose the taxes necessary to meet the obligations of Lyons City upon the taxable property within the limits of the latter city. By this provision of the section, the city of Clinton is created a trustee, and charged with the performance of certain duties to the creditors of Lyons City. The rights thus created in favor of the creditors of Lyons City by the State statute are enforceable in the courts of the United States, but the method or mode of enforcement is governed by the rules of Federal procedure, and there is no legal remedy of such a sufficient character as to preclude invoking the aid of a court of equity. Furthermore, even though it were true that a legal remedy did exist, that

would not defeat the right to invoke the jurisdiction in equity, provided it be the fact that the relation held by the city of Clinton in the matter of imposing taxes to meet the indebtedness of Lyons City is that of trustee. In such case the legal and equitable remedies would be concurrent, and either could be availed of by complainant."

Parties to such bills in equity.

Held, that the property owners of the city of Lyons on whose property the taxes were to be assessed for the payment of the debt were not necessary parties. *Burlington Sav. Bank v. City of Clinton*, 106 Fed. 269.

When city undertakes to levy and collect assessments to pay street-improvement bonds.

820. (Iowa, 1901.) "It is clear that if the relation imposed upon the city with respect to the levying, collecting, and disbursement of the special taxes authorized by the act is that of a trustee, then the equitable jurisdiction cannot be questioned, and it seems equally clear that the city is a trustee with respect to the fund necessary to be raised to pay the bonds in question. Every element necessary to create a trust relationship is found in the duty imposed upon the city, it having chosen to undertake the improvement of its streets under the provisions of the act of the 20th general assembly, and having thereby obligated itself to impose, collect, and disburse the taxes provided for in the act for the benefit of persons purchasing the bonds. This being the fact then, as is ruled by the Supreme Court in *Case v. Beauregard*, 101 U. S. 688, 25 L. Ed. 1004, 'It may be said that whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies.'" Held, also, that the owners of property assessed were not necessary parties to the bill. *Farson et al. v. City of Sioux City et al.*, 106 Fed. 278.

Equitable relief denied, when.

821. (Neb. 1901.) Where a county issued its obligations in the form of negotiable bonds, payable pro rata from annual levies of taxes, at a definite rate and such obligations were

held by a number of persons; held, that the several holders could not collectively maintain a bill in equity against the county to have the validity of the obligations established and to obtain a decree against the county for the sum due on the whole issue remaining unpaid.

"No reason is perceived why each holder of one or more of the obligations in suit may not sue at law, as one of them has already done, and obtain a judgment for the sum due himself, by proving at the trial what sum would have been raised, and what part thereof would have been payable to him, had the tax been levied. Nor do we perceive that the remedy in equity is any more efficacious than at law. All that a court of equity can do is to determine the validity of the obligations and render a money decree for the amount of the annual installments then due and unpaid. As much can be done by a court of law, and with equal facility. Moreover, after the validity of the obligations has been established, and a judgment obtained, resort must then be had to a legal remedy, to wit, a writ of mandamus, to compel the levy of a tax to pay the judgment whether it be recovered at law or in equity, since it is a well-settled doctrine in the Federal courts that a court of equity cannot command the levy of a tax; that being a duty which the legislature must impose; the sole function of the courts being to enforce its performance by mandamus when it has been imposed." *Washington County v. Williams*, 111 Fed. 801, 49 C. C. A. 621.

Stipulations in bond must comply with statutory requirement, to entitle holder to extraordinary remedy.

822. (Ky. 1902.) An enabling statute provided that "The bonds to be issued under the act to which this is an amendment shall, on their face, stipulate that the holders of any of them, or of any coupon thereof, shall be entitled to the remedies for the collection for the same herein, and in the act to which this is an amendment, provided for." The bonds involved in this case did not contain the required stipulation. Held, that the holder was not entitled to the extraordinary remedy provided in the act

"An attentive consideration of the principle of statutory construction here involved leads us to conclude that when a statute gives a new and unusual remedy, and directs how the right to the remedy is to be acquired or enjoyed, and how it is to be enforced, the act should be strictly construed; and the validity of all acts done under authority of such an act will depend upon a compliance with its terms. In respect to such acts the steps pointed out for the acquisition, preservation and enforcement of the remedies provided should be construed as mandatory, rather than optional. *Suth. St. Const.* 454, 458, and cases cited; *Atkins v. Kinnan*, 20 Wend. 241, 249, 32 Am. Dec. 534; *Davidson v. Gill*, 1 East, 64; *French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702; *Lyon v. Alley*, 130 U. S. 177, 9 Sup. Ct. 480, 32 L. Ed. 899." *Campbellville Lumber Co. v. Hubbert*, 50 C. C. A. 436, 112 Fed. 718.

Subrogation of holder of void funding bonds to rights of holder of county warrants which were funded.

823. (Kan. 1903.) *Kearney county, Kansas*, issued bonds to fund its outstanding warrants. The funding bonds were so issued without legal authority and were void.

Held, that bona fide holders of such bonds were subrogated to the rights of the holders of the warrants which had been so funded, surrendered and canceled.

"It so happened that the bonds so issued were void because the time had not arrived when the county could lawfully issue bonds. It had not been organized for one full year before the refunding bonds were issued, and the laws of the State provided that 'no bonds of any kind shall be issued by any county * * * within one year after the organization.' *Coffin v. Board of Commissioners of Kearny county*, 57 Fed. 137, 6 C. C. A. 288. The void bonds so issued were placed upon the market, and were purchased by the complainants in good faith. It admits of no controversy, we think, that, if the bonds were in the hands of the original warrant holders, they could surrender them to the county, and insist upon the payment of the warrants which have now been can-

celed and destroyed, since the delivery by a debtor to his creditor of a void note or bond in payment of an existing indebtedness does not operate as payment, but leaves the debt undischarged. In the forum of equity the purchasers of these void bonds have the same rights as the original warrant holders; that is to say, because the bonds were void, a court of equity will treat the sale of the bonds to an innocent purchaser as tantamount to a sale and assignment of the warrants for which the bonds were issued, and of all rights arising thereunder. This view is fully sustained by the decision of this court in *Geer v. School District No. 11*, 49 C. C. A. 539, 547, 548, 111 Fed. 682, and by the decision in *Parkersburg v. Brown*, 106 U. S. 487, 503, 504, 1 Sup. Ct. 442, 27 L. Ed. 238."

A number of cases distinguished.

Equity has jurisdiction in such cases.

"Nor do we perceive that there is any force in the further suggestion of counsel for the appellant that the complainants below were not entitled to relief in equity and that such rights, if any, as they possessed, could have been enforced by an action at law. When the bills were filed the warrants in question had been canceled and destroyed, and were no longer in existence. It was necessary, therefore, or at least the complainants were entitled to seek a rescission of the agreement in virtue of which the warrants had been ostensibly paid by the issuance and delivery to the warrant holders of void refunding bonds; and, when resort was had to a court of equity for that purpose, it was competent for the court, besides entering a decree rescinding the agreement and declaring the warrants to be still unpaid, to afford the complainants full relief in that proceeding, by ascertaining the amount due on the warrants and directing that it be paid." *Board of Comrs. of Kearny County, Kansas, v. Irvine*, 61 C. C. A. 607, 128 Fed. 689.

Subrogation; when does not follow.

824. (Texas. 1903.) "Whatever may have been the equity existing in favor of the original purchasers of the school bonds in question from the city of

Lampasas, we are clear that the complainant in this case was a volunteer, and from his purchase in open market no subrogation followed." *Beardsley v. City of Lampasas*, 62 C. C. A. 120, 127 Fed. 819.

Municipality accountable for money received by it for its invalid bonds issued for a lawful purpose.

825. (Mich. 1904.) "This is a case for the application of the settled rule that a city may be compelled to pay back money which it has received for bonds illegally issued, when the purpose of the loan was lawful, and the creation of the debt not prohibited by law (*Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659; *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Chapman v. Douglas County*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; *Read v. City of Plattsburgh*, 107 U. S. 508, 2 Sup. Ct. 208, 27 L. Ed. 414; *Logan County Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 490, 35 L. Ed. 107; *Aldrich v. Chemical Nat. Bank*, 170 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611), and does not come within the exception exempting a city from liability where it has never received the benefit of the money, or the loan itself was in excess of its authority to create a debt (*Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132; *Etna Life Ins. Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. Ed. 1044). This court has applied both the rule and the exception—the former in the cases of *city of Gladstone v. Troop*, 71 Fed. 341, 18 C. C. A. 61, and *Andrews v. Youngstown*, 86 Fed. 583, 596, 30 C. C. A. 293, and the latter in the case of *Travelers' Ins. Co. v. Johnson City*, 99 Fed. 663, 40 C. C. A. 58, 49 L. R. A. 123. In the last case mentioned there is a careful review of the authorities up to that time.

"In the present case it is conceded that the bonds were for a lawful purpose—to raise money 'for paying the floating indebtedness of the city and making public improvements.' The money was paid to the city, and the city has had the benefit of it ever since."

Present holders of the bonds are entitled to such recovery.

"The claim against the city for money due and received is in lieu of the action on the bonds which would exist if they were valid. An assignment of the bonds carries the right to recover from the obligor the money paid him for them, in case the bonds should prove to be invalid. This equitable right to recover the consideration paid for invalid bonds is recognized as existing in the bondholders in the cases we have cited and others. *Louisiana v. Wood*, supra; *Parkersburg v. Brown*, supra; *Chapman v. Douglas County*, supra; *Travelers' Ins. Co. v. Johnson City*, supra; *Hedges v. Dixon County*, 150 U. S. 182, 186, 14 Sup. Ct. 71, 37 L. Ed. 1044."

Equity has jurisdiction to determine rights of several holders of the bonds.

The facts and grounds of equity jurisdiction discussed. Held, under the circumstances stated, "The extent of the claim of each complainant, and his share of the amount to be distributed, must therefore be ascertained. These relative rights can be properly determined only by a court of equity. In this connection, it is to be observed that, a limited amount only being available for distribution, the interests of the bondholders may conflict among themselves. "Each bondholder may desire to be heard not only with regard to his own claim, but in respect of the claims of others whom he may consider not entitled to participate in the fund. *Bailey v. Tillinghast*, 99 Fed. 801, 40 C. C. A. 93." *Chelsea Savings Bank v. City of Ironwood*, 66 C. C. A. 230, 130 Fed. 410.

City accountable to bondholders as trustee for collection and payment of special assessments.

826. (Wis. 1904.) "The appellant, the owner of the bonds in question, has, for the purposes of this suit, waived any claim thereon except for such relief as he may be entitled to growing out of the acts and omissions of the city with respect to the assessments pledged for the payment of the bonds. Therefore, within the theory of the bill and stipulation, the city is

not a primary debtor, but merely the legal agent through whom the special assessments are to be collected. The municipality is statutory trustee for collection, bound to the exercise of due diligence to collect according to law, enforcing the lien through municipal machinery as agent of the owners of the bonds and answerable for failure to perform this duty, or in paying over or in failing to pay the money collected. *New Orleans v. Warner*, 175 U. S. 120, 132, 20 Sup. Ct. 44, 44 L. Ed. 96. It is not a guarantor of collection; and, unless there be such failure in duty, there cannot be liability for noncollection. *Roter v. City of Superior*, 115 Wis. 243, 91 N. W. 651."

County treasurer, collecting special assessments on delinquent tax roll of city trustee for bondholders, under the law of Wisconsin.

"These special assessments are private property and belong to the owners of the bonds, not to the municipality. The law requires that they should be carried out on the tax roll in separate columns opposite the respective lots affected. Although as a matter of bookkeeping, the total delinquent tax, whether composed of general tax or special assessments, or both, is returned to the county treasurer in a lump sum, the tax roll delivered to him with the return exhibits the special assessments in separate columns. There is no need of confusion, for upon collection by the county treasurer the particular assessment paid is checked off upon the tax roll. So that it is a matter of no difficulty to trace each assessment paid, and the law requires the county treasurer to pay to the owner the amount collected. Therefore it was held in the *Hobe* case that mandamus would lie to compel the county treasurer to pay directly to the owner the assessments by him collected, without regard to his account with the city treasurer. None of these cases, as we read them, sanctions the theory that the city becomes liable simply because of the return of the tax as delinquent. They place liability upon the ground of the receipt of the moneys by the municipality or officer sought to be charged."

Each bondholder entitled to pro rata share of fund derived from special assessments.

"The fifth assignment questions the action of the trial court in limiting the amount of his recovery to his pro rata share of the fund to which the holders of all the bonds were entitled. This fund, derivable from the assessments, was a trust fund, pledged to the payment of all the bonds. The right of the appellant therein was only such portion of the fund realized as the sum of his bonds bore to the entire amount of the issue of bonds. It is true that equity favors the vigilant, not the slothful; but we think it would be a manifest perversion of equity to require a trustee to commit a breach of trust owing to other cestuis que trustent, by taking from other bondholders and awarding to the appellant so much of this fund as would pay his bonds in full. We know of no principal of equity which would warrant such a decree."

Rate of interest recoverable from city as such trustee by bondholder.

"The sixth assignment has reference to the question of interest. The rate allowed was that which the city received from the depositories of the fund, and that usually is all that a trustee in like circumstances would be liable to pay. The insistence is based upon the theory that the city had converted the fund, but we are unable to concur in that contention." *Jewell v. City of Superior*, 135 Fed. 19, 67 C. C. A. 623.

Equity has jurisdiction, in action to enforce payment of bonds, when.

827. (Iowa, 1906.) "If the Riverside district, which issued the bonds, had remained in existence, complainant's remedy would be clear—a simple action at law, founded on the promise of the school district—but after the bonds in question had been issued by the district, it was divided into two constituent districts, the defendants herein. No question is made in argument or brief as to the legality of this subdivision, or as to many of the legal incidents resulting therefrom. Upon the division of its territory into two independent districts, the River-

side district ceased to exist as a corporation, and its liabilities devolved, not by any express statutory provision to that effect, but from the reason and necessity of the case, upon the two constituent districts. All school property was then and now exempt from execution, and could, therefore, not be resorted to for the payment of any of the debts of the district. By the dissolution of the old district, its power to levy taxes for paying its debts ceased. The new districts alone had that power. The same property and persons which were originally subject to taxation for the payment of the debts of the original district went over as property and persons subject to the authority of the constituted agents of the new districts. The liability which attached to them when in the old district equitably followed them in the changed form of their corporate existence. These principles have been recognized and accepted, not only in Iowa, but elsewhere." (Numerous authorities cited.)

"There was no privity of contract between complainant or any holder of the bonds of the old district and the new constituent districts. See cases, *supra*. At best, the law provided for an assumption of those debts by the new districts. Such an assumption by a third party of the debt of another does not ordinarily create a legal liability which the creditor, not a party to the agreement of assumption, can assert against him in an action at law. As his right does not rest on privity of contract, but is purely equitable, he is required to resort to equity to enforce it. Whatever may be the decisions of state courts (and we admit they are contradictory on this question), the rule of the national courts is clear and uniform." (Citing authorities.) *Gamble v. Rural Independent School District of Allison, et al.*, 76 C. C. A. 539, 146 Fed. 113.

City as trustee for holder of bonds payable by tax on a street improvement district; laches of holder.

828. (Calif. 1908.) "The present case is a suit in equity, the purpose

of which is to charge the appellee as a voluntary trustee of the appellant for the collection of the taxes provided for in the act authorizing the widening of Dupont street, and it is the contention of the appellant that such a suit is maintainable under the authority of *Warner v. New Orleans*, 187 U. S. 467, 17 Sup. Ct. 892, 42 L. Ed. 239, and *New Orleans v. Warner*, 175 U. S. 120, 20 Sup. Ct. 44, 44 L. Ed. 96. We find it unnecessary to decide whether the doctrine applicable to the present case is found in those decisions, or in the case of *Peake v. City of New Orleans*, 139 U. S. 342, 11 Sup. Ct. 541, 35 L. Ed. 131, which is cited and relied upon by the appellee. Assuming that by exercising the option granted to it by section 21 of the act, and adopting the resolution which it was thereby authorized to adopt, the appellee became a voluntary trustee for the collection of the taxes and the payment of the same to the bondholder, we are of the opinion that the facts alleged in the bill affirmatively show that the appellant's prayer for equitable relief must be denied on account of her laches. From the bill it appears that the principal of the bonds became due and payable January 1, 1897, and that the thirty-five unpaid interest coupons attached thereto became due and payable semi-yearly from the year 1879 to the year 1897; in other words, at the time of the commencement of the suit nearly eight years had elapsed since the accrual of the cause of action on the bonds, and twenty-five years had elapsed since the accrual of the cause of action on the first unpaid coupon."

(After quoting from the opinion in the case of *New Orleans v. Warner*, 175 U. S. 120-130, 20 Sup. Ct. 44, 48, 44 L. Ed. 96.)

"Such is not the case presented upon the bill now under consideration. It is true that the appellee has not answered setting forth its attitude to the subject-matter of the suit; but it is well settled that, where the bill shows upon its face that the plaintiff by reason of lapse of time and of his own laches, is not entitled to relief, the objection may be taken by demurrer. *Maxwell v. Kennedy*, 8 How. 210, 12 L. Ed. 1061; *National Bank v.*

Carpenter, 101 U. S. 567, 25 L. Ed. 815; *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219."

"Turning to the bill in the present case, we find therein the allegation that 'at divers and sundry times since the year 1877 and the commencement of this suit' the appellant has demanded payment of the bonds and the interest coupons, and that payment has been refused; that the appellee, 'in violation of the terms of said trust and its duty and obligation thereunder, did not keep and perform the conditions and obligations of said trust, and has wholly abandoned the same without notice of any kind to this plaintiff, and did not perform the duties imposed upon it as trustee as defined in said act, but, on the contrary, failed and neglected, during the time specified in said act, or at any time, to assess, levy and collect, or cause to be assessed, levied and collected, from the property specified in said act or otherwise, taxes sufficient to pay the interest coupons, and to redeem the said bonds.' The bill proceeds to set forth the excuses proffered by the appellee for failing to fulfill the obligations imposed upon it by the act of the Legislature, which excuses are, among others, that suits were brought in 1880 to enjoin the tax collector from selling property in said district for payment of taxes assessed for the purpose of carrying out the scheme of the act. In brief, the bill presents a case where the alleged trustee had, twenty-five years before the commencement of this suit, ceased and refused to perform any of the acts required to be performed by it under the terms of the statute, and, while it alleges affirmatively that the appellee never at any time asserted to the appellant that it was not liable as trustee or otherwise upon such bonds and coupons, it makes no allegation that the default and refusal of the appellee to collect taxes and pay coupons which accrued twenty-five years before the commencement of the suit was not well known to her at the time. In fact, the contrary appears from the bill. The allegation is that, although the trustee repudiated the trust, it never advised her personally of that fact. This is clearly in-

sufficient to excuse appellant's laches, and her waiting all these years before taking any step whatever to enforce her rights.

"It is true it is well settled by the authorities that the statute of limitations has no application to an express continuing trust not disavowed to the knowledge of the cestui que trust. But when the trust is repudiated, and knowledge of the repudiation is brought home to the cestui que trust, the case is brought within the ordinary rules of limitations and laches."

A number of authorities cited and discussed. *Eddy v. City and County of San Francisco*, 80 C. C. A. 327, 102 Fed. 441.

City and county held accountable for special assessments collected.

829. (4Wis. 1009.) "The improvement bonds described in this bill were issued under the provisions of chapter 16 of the charter of 1880 for the city of Superior (chapter 152, p. 349, Laws Wis. 1889), which are summarized with the opinion of this court in *White River Sav. Bank v. City of Superior*, supra. In reference to those provisions, we deem it sufficient to remark

that they plainly intend and require (section 161) that the bonds so issued for street improvement shall be secured by special assessments, made by the city upon lots named, for their payment (section 163); that one-fifth of the amount assessed (with interest) is to 'be extended on the tax roll as a special tax on said property,' and 'when collected the same shall be credited to the fund against which payments on said bonds are charged,' and thus to continue annually until paid up; and (section 162) that payments upon the bonds therefrom are to be made by the city treasurer. The intention, therefore, is unmistakable, as stated in the opinion of Judge Jenkins, speaking for this court, in *Jewell v. City of Superior*, supra, that 'these special assessments are private property and belong to the owners of the bonds, not to the municipality,' with the city made 'trustee for collection.'"

Held, that the holder of the bonds was entitled to an accounting with the city and the county, by whose treasurer the assessments had been collected. *Hayden v. Douglas County*, Wis., 95 C. C. A. 298, 170 Fed. 24.

C. Mandamus, an Ancillary Remedy in Federal Courts; Nature of the writ, Extent of Remedy for Enforcement of Municipal Obligations.

1. Jurisdiction of Federal Courts in Mandamus Ancillary, not Original.

Mandamus proper remedy, when; federal court jurisdiction; alternative writ unnecessary.

830. (Ind. 1860.) Application was made to the Circuit Court for a writ of mandamus to compel the board of commissioners of Knox County, Ind., to levy a tax to satisfy a judgment rendered by that court against the board on interest coupons from railroad-aid bonds. The enabling act made it the duty of the board, "at the levying of the county taxes for each year, to assess a special tax, sufficient to realize the amount of the interest to be paid for the year."

This the board had not done, and refused to do. Held, that a writ of mandamus was the proper remedy.

"Now, it is not alleged nor pretended but that, if this judgment had been obtained against the corporation in a State court, the remedy now sought could have been obtained; for it must be admitted, that, according to the well-established principles and usage of the common law, the writ of mandamus is a remedy to compel any person, corporation, public functionary, or tribunal, to perform some duty required by law, where the party seeking relief has no other legal remedy, and the duty sought to be enforced is clear and indisputable. That this case comes completely within the category is too clear for argument; for, even assuming that a general law of Indiana permits the public property

of the county to be levied on and sold for the ordinary indebtedness of the county, it is clear that the bonds and coupons issued under the special provisions of this act were not left to this uncertain and insufficient remedy. The act provides a special fund for the payment of these obligations, on the faith and credit of which they were negotiated. It is especially incorporated into the contract, that this corporation shall assess a tax for the special purpose of paying the interest on these coupons. If the commissioners either neglect or refuse to perform this plain duty, imposed on them by law, the only remedy which the injured party can have for such refusal or neglect is the writ of mandamus." Held, also, that the Federal courts had jurisdiction to issue the writ.

"By the common law, the writ of mandamus is granted by the King's Bench, in virtue of its prerogative and supervisory power over inferior courts. The courts of the United States cannot issue this writ by virtue of any supervisory power at common law over inferior State tribunals. They can derive it only from the Constitution and laws of the United States.

"The jurisdiction of these courts is, by the Constitution, extended to 'controversies between citizens of different States.' Congress has authority to make all laws which shall be necessary and proper for carrying this jurisdiction into effect. The jurisdiction of the court to give the judgment in this case is not disputed; nor can it be denied, that by the Constitution, Congress has the power to make laws necessary for carrying into execution all its judgments. (See *Wayman v. Southard*, 10 Wheat. 22.) Has it done so?

"By the 14th section of the Judiciary Act of 1789, it is enacted 'that courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles of the common law.'

"Now, the 'jurisdiction' is not disputed, and it is 'necessary' to an efficient exercise of this jurisdiction that the court have authority to compel the exercise of a ministerial duty by the corporation, which by law they are bound to perform, and by the performance of which alone the plaintiff's remedy can be effected. The fund to pay this judgment, by the face of the contract, is a special tax laid and to be collected by defendants. They refuse to perform a plain duty. There is no other writ which can afford the party a remedy, which the court is bound to afford, if within its constitutional powers, except that afforded by this writ of mandamus. It is 'agreeable to the principles of the common law,' and, consequently, within the category as defined by the statute."

"It is no objection, therefore, to the use of this remedy, that the party might possibly obtain another by commencing a new litigation in another tribunal."

Held, also, that it was no reason for setting aside the peremptory writ that a previous alternative writ had not issued. *Knox County Comrs. v. Aspinwall*, 24 How. 376, 16 L. Ed. 735.

Mandamus not an original proceeding in federal courts; is a proceeding ancillary to judgment and a substitute for ordinary process of execution.

831. (Towa, 1867.) "None of the Circuit Courts in the several States can issue the writ as an exercise of original jurisdiction, any more than this court, but they may issue it whenever it is necessary, agreeably to the principles and usages of law, to the exercise of their proper jurisdiction, and their judgments in such cases may be re-examined in this court, on writ of error, under the twenty-second section of the Judiciary Act."

"It is a proceeding ancillary to the judgment which gives the jurisdiction, and when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the same." *Riggs v. Johnson County*, 6 Wall. 166.

Mandamus not an original proceeding in federal courts; is only ancillary, in aid of jurisdiction previously acquired; discussion of its nature and authority for its use.

832. (Ky. 1871.) The Circuit Courts of the United States are courts of limited jurisdiction and have no authority to issue the writ of mandamus as an original proceeding. Their jurisdiction in mandamus proceedings is only ancillary for the purpose of enabling them to enforce their own judgments.

"It must be considered as settled that the Circuit Courts of the United States are not authorized to issue writs of mandamus, unless they are necessary to the exercise of their respective jurisdictions. Those courts are creatures of statute, and they have only so much of the judicial power of the United States as the acts of Congress have conferred upon them. The Judiciary Act of 1789, which established them, by its 11th section, enacted that they shall have original cognizance, concurrently with the courts of the several States, of 'all suits of a civil nature at common law, or in equity,' between a citizen of the State in which the suit is brought and a citizen of another State, or where an alien is a party. While it may be admitted that in some senses the writ of mandamus may properly be denominated a suit at law, it is still material to inquire whether it was intended to be embraced in the gift of power to hear and determine all suits at common law, of a civil nature, conferred by the Judiciary Act. At the time when the act was passed it was a high prerogative writ, issuing in the King's name only from the Court of King's Bench, requiring the performance of some act or duty, the execution of which the court had previously determined to be consonant with right and justice. It was not, like ordinary proceedings at law, a writ of right, and the court had no jurisdiction to grant it in any case except those in which it was the legal judge of the duty required to be performed. Nor was it applicable, as a private remedy, to enforce simple common-law rights between individuals.

Were there nothing more then in the Judiciary Act than the grant of general authority to take cognizance of all suits of a civil nature at common law, it might well be doubted whether it was intended to confer the extraordinary powers residing in the British Court of King's Bench to award prerogative writs. All doubts upon this subject, however, are set at rest by the 14th section of the same act, which enacted that Circuit Courts shall have 'power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions and agreeable to the principles and usages of law.' Among those other writs, no doubt, mandamus is included; and this special provision indicates that the power to grant such writs generally was not understood to be granted by the 11th section, which conferred, only to a limited extent, upon the Circuit Courts the judicial power existing in the government under the Constitution. Power to issue such writs is granted by the 14th section, but with the restriction that they shall be necessary to the exercise of the jurisdiction given. Why make this grant if it had been previously made in the 11th section? The limitation only was needed." *Bath County v. Amy*, 13 Wall. 244.

Judgment at law first necessary.

833. (La. 1873.) "It has been decided in numerous cases, founded on the refusal to pay corporation bonds, that the appropriate proceeding was to sue at law and by a judgment of the court establish the validity of the claim and the amount due, and by the return of an ordinary execution ascertain that no property of the corporation could be found liable to such execution and sufficient to satisfy the judgment. Then, if the corporation had authority to levy and collect taxes for the payment of that debt, a mandamus would issue to compel them to raise by taxation the amount necessary to satisfy the debt." *Heine v. Levee Comrs.*, 19 Wall. 655, 22 L. Ed. 223.

Jurisdiction ancillary.

834. (Cal. 1887.) The former decisions to the point that the jurisdiction of the Federal courts in mandamus is merely ancillary to enforce their judgments, and is in the nature of an execution reviewed and followed.

Original jurisdiction cannot be conferred by removal of cause from state courts.

In such proceedings jurisdiction cannot be acquired by a Federal court by the removal of a cause to that court from the State court. The question discussed and authorities examined. *Rosenbaum v. Bauer*; *Rosenbaum v. San Francisco*, 120 U. S. 450, 7 Sup. Ct. Rep. 633, 30 L. Ed. 743.

Jurisdiction of federal courts in mandamus ancillary.

835. (Colo. 1896.) "It is a familiar doctrine that the Federal courts have no power to issue a writ of mandamus commanding State officers to levy a tax or to do any other act, unless such power is exercised as ancillary to a jurisdiction already acquired. 'The power to issue a writ of mandamus as an original and independent proceeding does not belong to the Circuit Courts' of the United States. It is a power which is derived solely from the fact that jurisdiction to hear and decide a given case has already attached, and that the issuance of the writ is necessary to render that jurisdiction effectual." *Stryker v. Board of Comrs. of Grand County, Colo.*, 23 C. C. A. 286, 77 Fed. 567.

Jurisdiction of federal courts to issue writs of mandamus.

836. (Neb. 1898.) It was urged in this case that the Circuit Court had no right to entertain the application for a writ of mandamus, as the laws of Nebraska only authorized such application to be made to particular courts of the State.

"With reference to this contention it is only necessary to say that it has long been settled that the Federal courts may issue writs of mandamus to compel the levy of a tax to pay

judgments which they have rendered against counties or other municipal corporations, when, by the laws of the State, it is expressly or impliedly made the duty of the officers of such municipalities to make provision for the payment of such judgments by an exercise of the power of taxation. This power has been exercised repeatedly by the Federal courts and of its existence at the present time there can be no reasonable doubt. If the courts of Nebraska can compel the officers of a county to levy a tax to pay a judgment rendered against a county,—as they doubtless may do,—then the Circuit Court of the United States for the district of Nebraska can exercise a similar jurisdiction to compel the payment of a judgment by it rendered. *Stryker v. Board*, 40 U. S. App. 585, 599, 23 C. C. A. 280, and 77 Fed. 567; *Riggs v. Johnson County*, 6 Wall. 166; *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Butz v. City of Muscatine*, 8 Wall. 575, 581; *United States v. New Orleans*, 98 U. S. 381, 393; *Loan Assn. v. Topeka*, 20 Wall. 660; *Wolff v. New Orleans*, 103 U. S. 358; *United States v. Clark County*, 96 U. S. 216; *Ralls County Court v. United States*, 105 U. S. 733." *Deuel County, Nebr., v. First National Bank of Buchanan County, Mo.*, 30 C. C. A. 30, 86 Fed. 264.

Mandamus not an original action in federal courts; proper in aid of already-acquired jurisdiction.

837 (Cal. 1899.) In an action at law upon municipal bonds, "where the plaintiff recovers and there are no moneys in the fund out of which an execution issued upon the judgment can be satisfied, and this because of the refusal of the proper officers to levy the taxes, the Federal courts will issue a writ of mandamus in aid of its already-acquired jurisdiction. This is quite distinct from an original proceeding for the issuance of a writ of mandamus, which it is well settled cannot be maintained in the Federal courts." *City of Santa Cruz v. Waite*, 39 C. C. A. 106, 98 Fed. 367.

Jurisdiction of federal courts in mandamus not regulated by state statutes.

838. (La. 1901.) "There seems to be no foundation for the further contention made by the board that the Circuit Court of this district has no jurisdiction to issue the writ of mandamus in any case, because it has not been shown that the remedy was adopted from the State practice by the practice act of 1872, or any general order of this court. The writ was authorized by the fourteenth section of the original Judiciary Act of 1789, now section 716 of the Revised Statutes, and is not derived from any practice act of the State. *Bath Co. v. Amy*, 13 Wall. 244, 20 L. Ed. 539; *Riggs v. Johnson Co.*, 6 Wall. 167, 18 L. Ed. 768; *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743." *Board of Liquidation v. United States*, 108 Fed. 689, 47 C. C. A. 587.

Court may levy and collect tax to pay judgment rendered by it when duly authorized by legislature.

839. (Ky. 1902.) Though "the

power to impose a tax or raise money by general assessment for a public purpose is a very high attribute of sovereignty, and can only be exercised when authorized by express legislative authority," and, though "the power to appoint a collector to collect a tax lawfully assessed does not exist in a court unless expressly authorized by legislative authority,—when the legislature has deputed to a court the power, in given circumstances, to levy and collect a tax for the satisfaction of a judgment rendered by that court, the power has been exercised without question. *Stansell v. Levee Board* (D. C.), 13 Fed. 846; *Supervisors v. Rogers*, 7 Wall. 175, 19 L. Ed. 162."

Jurisdiction of federal court.

"In the cases cited above the power was exercised by a Federal court by virtue of a State statute, as a remedy which followed the debt, and which might be enforced by a United States court in a case where Federal jurisdiction otherwise existed." *Campbellsville Lumber Co. v. Hubbert*, 50 C. C. A. 435, 112 Fed. 718.

2. Nature and Office of Writ of Mandamus; When Awarded; To What Extent the Payment of Municipal Obligations May be Enforced by Mandamus.

Language in form permissive, held to be peremptory.

840. (Ill. 1866.) An act declared that the board "may if deemed advisable" levy a special tax to liquidate indebtedness. Held, that this language should be construed to be peremptory.

"The counsel for the respondents insists, with zeal and ability, that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors, and that judicial action cannot control the discretion with which the statute has clothed them. We cannot concur in this view of the subject. Great stress is laid by the learned counsel upon the language, 'may, if

deemed advisable,' which accompanies the grant of power, and, as he contends, qualifies it to the extent assumed in his argument."

"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a

remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.'

"The line which separates this class of cases from those which involve the exercise of a discretion, judicial in its nature, which courts cannot control, is too obvious to require remark. This case clearly does not fall within the latter category." *Supervisors v. United States*, ex rel., 4 Wall. 435, 18 L. Ed. 419.

To the same point see *City of Little Rock v. United States*, 103 Fed. 418, 43 C. C. A. 261.

Tax authorized when bonds issued will be enforced.

841. (Ill. 1866.) Mandamus will lie to compel the authorities of a city to levy a tax sufficient to pay a judgment rendered against the city upon its bonds, when such tax was authorized by laws in force when the bonds were issued, notwithstanding such taxing power has been abridged by subsequent enactment. *Von Hoffman v. City of Quincy*, 4 Wall. 535, 18 L. Ed. 403.

Diminished resources of a city after bonds issued no defense to mandamus to compel levy of tax.

842. (Ill. 1866.) "The counsel for the plaintiffs in error has called our attention, with emphasis and eloquence, to the diminished resources of the city, and the disproportionate magnitude of its debt. Much as personally we may regret such a state of things, we can give no weight to considerations of this character, when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditor, and our duty to enforce them." *City of Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560.

Nature of writ of mandamus as issued by federal courts; is a substitute for ordinary process of execution.

843. (Ill. 1867.) "Mandamus, when issued in such a case by the Circuit Court is neither a prerogative writ nor a new suit. On the contrary, it is a writ authorized by the fourteenth section of the Judiciary Act, as necessary to the exercise of jurisdiction which has previously attached; and when issued in such a case becomes the sub-

stitute for the ordinary process of execution to enforce the judgment." *Weber v. Lee County*, 6 Wall. 210.

Writ performs the office, and is the legal equivalent, of an execution against an individual. *Lafayette County, Mo., v. Wonderly*, 34 C. C. A. 360, 92 Fed. 313.

Appropriate remedy.

844. (Iowa, 1867.) Mandamus and not a bill in equity is the proper remedy to compel the levy of a tax for the payment of a judgment against a city. *Walkley v. City of Muscatine*, 6 Wall. 481, 18 L. Ed. 930.

Statutes of Iowa construed; writ awarded directing levy of special tax.

845. (Iowa, 1869.) The charter of the city of Muscatine, Iowa, provided for a levy of a tax of not exceeding one per cent. upon the value of the taxable property of the city in any one year. On application for a writ of mandamus to compel the levy of a tax to pay a judgment rendered against the city, held, that this limitation applied to the ordinary course of municipal action of Muscatine, and that other laws — the Code provisions of Iowa — authorized a further tax to pay a judgment against the city. As to the limit of such tax for such purpose, the court say:

"The extent of the necessity is the only limitation, express or implied, in the Code of the amount to be levied. We cannot interpolate a restriction by importing it from another act which has no necessary relation to the class of cases for which the Code intended to provide. When the judgment is recovered the duty arises, and it can be satisfied only by paying the debt, interest, and costs, in the manner prescribed. The source whence the means are to be drawn is described, and full power is given to collect them. There is no difficulty as to authority to levy a tax of the requisite amount, whatever it may be. Section 3276 of the Code declares, that a failure on the part of the officers of the corporation to perform the duty enjoined shall render them 'personally responsible for the debt.'

"In the construction of a statute, what is clearly implied is as effectual as what is expressed. The minutest details could not have made the meaning and effect of these provisions

clearer than they are. The limitation in the act of 1852 is confined to the city of Muscatine. The regulations of the Code are general in their terms, and apply to all the municipal corporations mentioned in section 3274. If these views be not correct, the position of the judgment creditor is a singular one. All the corporate property of the debtor is exempt by law from execution. The tax of one per cent. is all absorbed by the current expenses of the debtor. There is neither a surplus nor the prospect of a surplus which can be applied upon the judgment. The resources of the debtor may be ample, but there is no means of coercion. The creditor is wholly dependent for payment upon the bounty and the option of the debtor. Until the debtor chooses to pay, the creditor can get nothing. The usual relations of debtor and creditor are reversed, and the judgment, though solemnly rendered, is as barren of results as if it had no existence. Such are the effects which must necessarily follow from the theory, if maintained, of the defendants in error. Nothing less than the most cogent considerations could bring us to the conclusion that it was the intention of the law-making power of so enlightened a State to produce, by its action, such a condition of things in its jurisprudence." *Butz v. City of Muscatine*, 8 Wall. 575, 19 L. Ed. 490.

Mandamus lies to enforce an existing official duty.

846. (Iowa, 1873.) "It is very plain that a mandamus will not be awarded to compel county officers of a State to do any act which they are not authorized to do by the laws of the State from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being. And it may be observed that the office of a writ of mandamus is not to create duties, but to compel the discharge of those already existing. A relator must always have a clear right to the performance of a duty resting on the defendant before the writ can be invoked. Is it, then, the duty of the board of supervisors of a county in the State of Iowa to levy a special tax, in addition to a county tax of four mills upon the dollar, to satisfy

a judgment recovered against the county for its ordinary indebtedness? The question can be answered only by reference to the statutes of the State." *Supervisors v. United States*, 18 Wall. 71, 21 L. Ed. 771.

Limit of power of taxation to pay judgment on county warrants issued for ordinary county expenses.

847. (Iowa, 1873.) A statute of Iowa limited the taxes by counties for ordinary county revenue, including the support of the poor, to not more than four mills on the dollar, and a poll tax of fifty cents. Another statute provided as follows:

"In case no property is found upon which to levy, which is not exempted by the last section (section 3274), or if the judgment creditor elect not to issue execution against such corporation (a municipal one), he is entitled to the amount of his judgment and costs in the ordinary evidences of indebtedness issued by that corporation. And if the debtor corporation issues no scrip or evidences of debt, a tax must be levied as early as practicable, sufficient to pay off the judgment with interest and costs."

A judgment had been obtained against the board of supervisors upon county warrants drawn for the ordinary expenses of the county. On an application for a writ of mandamus to compel the levy of a tax to pay the judgment, held, that the latter statute conferred no independent power to levy a specific tax to pay such judgment. *Supervisors v. United States*, 18 Wall. 71, 21 L. Ed. 771.

Judiciary cannot create power to tax.

848. (Wis. 1873.) "We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important." *Rees v. City of Watertown*, 19 Wall. 107, 22 L. Ed. 72.

Mandamus not refused on account of distress of debtor.

849. (Wis. 1873.) "Upon a class of the defenses interposed in the answer and in the argument it is not necessary to spend much time. The theories upon which they proceed are vicious. They are based upon the idea that a refusal to pay an honest debt is justifiable because it would distress the debtor to pay it. A voluntary refusal to pay an honest debt is a high offense in a commercial community and is just cause of war between nations. So far as the defense rests upon these principles we find no difficulty in overruling it." *Rees v. City of Watertown*, 19 Wall. 107, 22 L. Ed. 72.

Power to tax legislative, not judicial.

850. (La. 1873.) "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, State or National. In the case before us the National sovereignty has nothing to do with it. The power must be derived from the legislature of the State. So far as the present case is concerned, the State has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the legislature either to assess the tax by special statute or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal court. It is unreasonable to suppose that the legislature would ever select a Federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal government of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee." *Heine v. Levee Comrs.*, 19 Wall. 655, 22 L. Ed. 223.

Interest not allowed on bonds before their issuance.

851. (Mo. 1877.) County bonds were actually issued January 1, 1874, but bearing date June 1, 1871, and having interest coupons attached representing installments of interest accruing prior to January 1, 1874. Having obtained

judgment on such coupons, relator applied for a writ of mandamus to compel the levy of a tax to pay the judgment. Held, that, as the bonds imposed no liability on the county until they were issued, there was no obligation resting on the county to levy a tax to pay the judgment.

"So long as the bonds remained unissued, the tax remained unauthorized. There never was, therefore, any authority given by law for the levy of that special tax for the years 1872 and 1873. The fact that the bonds, when delivered in 1874, had attached to them coupons for interest, which, apparently, had accrued prior to their delivery, could not enlarge the power of the County Court, or confer upon it authority to levy in any year more than one special tax of one-twentieth of one per cent. It need not be said that no court will by mandamus compel county officers of a State to do what they are not authorized to do by the laws of the State. A mandamus does not confer power upon those to whom it is directed. It only enforces the exercise of power already existing, when its exercise is a duty." *United States v. County of Clark*, 95 U. S. 769, 24 L. Ed. 545.

Limitation of tax, special act and general law construed together.

852. (Mo. 1877.) Bonds were issued by Clark county by authority of an act providing for the issue of railroad aid bonds, and authorizing a special tax not exceeding one-twentieth of one per cent. upon taxable property of the county. There was no provision in the act that the special tax alone should be applied to the payment of the bonds. Held, that the bonds were a debt of the county as fully as any other liability, and that the relator was entitled to a further levy in addition to the said special tax, if necessary to pay the bonds. The grounds of this decision discussed at length. *Supervisors v. U. S.*, 18 Wall. 71, distinguished. *United States v. County of Clark*, 96 U. S. 211, 24 L. Ed. 628; *County of Macon v. Huidekoper*, 99 U. S. 592, 25 L. Ed. 333.

General tax ordered to pay street-improvement bonds for which special assessment levied.

853. (Kan. 1878.) The city of Fort Scott, Kan., issued its bonds to pay for the improvement of a street under

an act which authorized special assessments to be made against abutting property, to provide a fund for the payment of the bonds. The ordinance of the city provided that the bonds should be paid solely from such special assessments.

In an action at law upon such bonds, the court rendered a judgment against the city in the ordinary form, except that there was added a clause to the effect that it be enforced and collected pursuant to law. In mandamus proceedings to compel the levy of a tax to pay the judgment, the city contended that the special assessment provided for in the act, and the ordinance was the bondholders' sole security. After reviewing the laws of Kansas relating to the subject, the court say:

"To that interpretation of the contract we cannot yield our assent. It is true that section 17 declares that 'for the payment of said bonds' assessments shall be made 'upon the taxable property chargeable therewith,' that is, 'on all lots and pieces of ground to the centre of the block, extending along the street or avenue, the distance improved.' But it is neither expressly nor by necessary implication provided that the holder of the bonds may not be paid in some other mode, or that the city will not, under the authority derived from other sections of the statute, comply with its promise to pay the bonds, with interest, at maturity. As between the city and its taxpayers, it was certainly its duty, through the council, to provide, if practicable, payment by taxation upon the property improved, rather than upon all the taxable property within its corporate limits. But the duty to make such distribution of the burden of special improvements did not lessen its obligation, in accordance with its express agreement, to pay the interest and principal of the bonds at maturity. *Hitchcock v. Galveston*, 96 U. S. 341." *United States v. Fort Scott*, 99 U. S. 152, 25 L. Ed. 348.

Tax limit imposed by legislature, controlling.

854. (Mo. 1873.) "If there had been nothing in the act to the contrary, it might, perhaps, have been fairly inferred that it was the intention of the legislature to grant full power to tax for the payment of the extraordinary debt authorized to an amount suffi-

cient to meet both principal and interest at maturity. This implication is, however, repelled by the special provision for the tax of one-twentieth of one per cent. and the case is thus brought directly within the maxim, *expressio unius est exclusio alterius*.

"Thus, while the debt was authorized, the power of taxation for its payment was limited, by the act itself and the general statutes in force at the time, to the special tax designated in the act, and such other taxes applicable to the subject as then were or might thereafter by general or special acts be permitted."

If municipality has no power to raise money by tax.

"If the statute gives no power to make the bond, the municipality is not bound. So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose. If the purchaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulties in the way of payment. As it is, he holds the obligation of a debtor who is unable to provide the means of payment. We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation. In this case it appears that the special tax of one-twentieth of one per cent. has been regularly levied, collected, and applied, and no complaint is made as to the levy of the one-half of one per cent. for general purposes. What is wanted is the levy beyond these amounts, and that, we think under existing laws, we have no power to order."

General law not applicable.

"Our attention has been directed to the General Railroad Law in force when the Missouri and Mississippi Railroad Company was incorporated and when the bonds in question were issued, and it is insisted that ample power is to be found there for the levy of the required tax. The power of taxation there granted is, as we think, clearly confined to subscrip-

tions authorized by that act, which require the assent of two-thirds of the qualified voters of the county. Under such circumstances, it seems to have been considered proper to allow substantially unlimited power of taxation to pay a debt which the voters had directly authorized. In this case no such assent was required and the taxpayers were protected against the improvident action of the official authorities by a limit upon the amount they should be required to pay in any one year. The General Railroad Act was in force when this company was incorporated, but its provisions seem not to have been satisfactory to the corporators. They wanted authority for counties to subscribe without an election, and on that account accepted the terms which were offered. As the bondholders claim upon the corporation, they must submit to the conditions as to taxation which were substituted for those that would otherwise have existed."

Judgment gives creditor no additional right of taxation.

"We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand and of the amount that is due, but it gives him no new rights in respect to the means of payment." *United States v. County of Macon*, 99 U. S. 582, 25 L. Ed. 331.

Impairment of creditors' remedies unconstitutional.

855. (La. 1881.) "The inhibition upon the courts of the State to issue a mandamus for the levy of a tax for the payment of interest or principal of any bonds except those issued under the premium-bond plan was a clear impairment of the means for the enforcement of the contract with the holders of the consolidated bonds. When the contract was made, the writ was the usual and the only effective means to compel the city authorities to do their duty in the premises, in case of their failure to provide in other ways the required funds. There was no other complete and adequate remedy. The only ground on which a change of remedy existing when a con-

tract was made is permissible without impairment of the contract is, that a new and adequate and efficacious remedy be substituted for that which is superseded. Here no remedy whatever is substituted for that of mandamus. The holders are denied all remedy. *Louisiana v. New Orleans*, 102 U. S. 203-207."

"Legislation of a State thus impairing the obligation of contracts made under its authority is null and void, and the courts in enforcing the contracts will pursue the same course and apply the same remedies as though such invalid legislation had never existed. The act of March, 1876, cannot, therefore, be permitted to restrict the power of the city authorities to levy the tax stipulated by the act of 1852 to pay the interest on the consolidated bonds issued thereunder, and to retire the bonds." *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090.

Mandamus is in nature of execution.

856. (Mo. 1881.) "The present suit is in the nature of an execution, and its object is to enforce the payment, in some way provided by law, of the judgment which has been recovered. The only defenses that can be considered are those which may be presented in the proper course of judicial procedure against the collection of valid coupons, executed under the authority of law and reduced to judgment. While the coupons are merged in the judgment, they carried with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all appropriate ways, notwithstanding the change in the form of the debt." *Ralls County Court v. United States*, 105 U. S. 733, 25 L. Ed. 1220, 1223.

Tax authorized when bonds issued will be enforced.

857. (Mo. 1881.) Mandamus will lie to require the proper corporate authorities to levy taxes for the payment of a judgment rendered on bonds, if such tax were authorized when the bonds were issued, notwithstanding laws subsequently passed purporting to take away the power to levy such taxes. *Ralls County Court v. United States*, 105 U. S. 733, 26 L. Ed. 1220, 1223.

Auditing officer failing to perform his duty.

858. (Ill. 1883.) In mandamus proceedings to enforce the payment of a judgment rendered upon bonds of a town, it is no defense to the writ that the town clerk, after the issuance of the bonds, had failed to make and transmit to the county clerk certain certificates required of him by law, as such certificates were intended merely to inform the county clerk of his duty to levy the necessary tax for the payment of the bonds and interest, that when the judgment was presented to him he was sufficiently informed that the liability of the town was established. *Hawley v. Fairbanks*, 108 U. S. 543, 2 Sup. Ct. Rep. 846, 27 L. Ed. 820.

Debts of the county payable from the general funds of the county.

859. (Mo. 1883.) Following the decisions in *United States v. County of Clark*, 96 U. S. 211, and other cases noticed, the court held that bonds of the character of those involved in this suit were debts of the county, and that, for any balance remaining due on account of principal or interest after the application of the proceeds of the special tax of one-twentieth of one per cent., the holders were entitled to payment out of the general funds of the county. Mandamus awarded. *Knox County Court v. United States ex rel. Harshman*; Same v. *United States ex rel. Davies*; Same v. *United States ex rel. Wells*; *Mason County Court v. Huidekoper, relator*; *Baker, Treas., v. United States ex rel. Davis*, 109 U. S. 229, 3 Sup. Ct. Rep. 131, 27 L. Ed. 915.

Taxes authorized for necessary current expenses of a city cannot be applied by court to payment of city's debts.

860. (Ill. 1884.) The charter of the city of East St. Louis limited its power to tax for all purposes to an "annual tax not exceeding one per centum per annum" upon the assessed value of all the taxable property in the said city, and required the city council to levy and collect a tax not exceeding three mills on the dollar for the purpose of paying interest on its bonds and providing a sinking fund to liquidate the same. Held, that one who had recovered a judgment against the city on its bonds was entitled to have

a tax of three mills levied for its payment, but was not entitled to have any part of the remaining seven mills so applied.

"That fund, by the terms of the charter of the city, under which the bonds were issued, is authorized for the purpose of paying the necessary current expenses of administration, not including payments on account of the bonds of the municipal corporation. And admitting that any surplus of such fund, in any year, remaining after payment of such expenses, ought to be applied to the payment of the interest and principal of the bonds, that could only be required when such surplus should have been ascertained to exist. In the present judgment the court has undertaken to foresee it, and by mandamus to compel the city, by limiting its expenditures for its general purposes, to create the surplus which it appropriates. But the question, what expenditures are proper and necessary for the municipal administration, is not judicial; it is confided by law to the discretion of the municipal authorities. No court has the right to control that discretion, much less to usurp and supersede it." *East St. Louis and the Treasurer of East St. Louis v. United States ex rel. Zebley*, 110 U. S. 321, 4 Sup. Ct. Rep. 21, 28 L. Ed. 162.

When specific tax provided for is not levied, creditor's remedies.

861. (La. 1884.) A judgment creditor of a municipal corporation whose judgment was rendered upon a contract obligation is not confined in his remedy to a specific tax required by law to be levied in a particular year if the authorities refused to levy and collect such tax within that year, but is entitled to the same tax from year to year until the judgment is paid. *Louisiana ex rel. Nelson v. Police Jury of St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. Rep. 648, 28 L. Ed. 574.

The question of authority to levy the tax controls.

862. (Ill. 1885.) In a proceeding in mandamus to compel the city authorities to levy taxes to pay a judgment of the relator rendered against the city on its bonds, the court say:

"We have only to inquire whether the corporate authorities of the city have the power under the laws of Illi-

nois to levy and collect such a tax." Held, that the relator was entitled to the writ.

"On behalf of the city it is contended that when these bonds were issued, the act of 1863 prohibited any annual levy of taxes 'to pay the debts and meet the general expenses of the city,' in excess of fifty cents on each one hundred dollars of the assessed value of its real and personal property. To this it may be replied, as was done in *Quindy v. Cooke*, in reference to similar language in the original charter of the city, that the act of 1863 related to debts and expenses incurred for ordinary municipal purposes, and not to indebtedness arising from railroad subscriptions, the authority to make which is not implied from any general grant of municipal power, but must be expressly conferred by statute. When the legislature in 1869 legalized and confirmed what the city council had previously done touching the subscription to the stock of the Mississippi and Missouri River Air Line Railroad Company, and thereby authorized bonds in payment thereof to be issued, it could not have been contemplated that indebtedness thus created would be met by such taxation as was permitted for ordinary municipal purposes. In giving authority to incur obligations for such extraordinary indebtedness, the legislature did not restrict its corporate authorities to the limit of taxation provided for ordinary debts and expenses."

A number of cases reviewed. *Quincy v. Jackson*, 113 U. S. 332, 5 Sup. Ct. Rep. 544, 28 L. Ed. 1001.

Levy to pay judgment on bonds will not be ordered when maximum tax all allowed and needed for current expenses.

863. (*Iowa*, 1885.) In a mandamus proceeding to compel the authorities of McAleer county to levy a tax to pay a judgment rendered in favor of the relator upon bonds of the county, the answer alleged that the full amount of taxes allowed by law for the ordinary revenue of the county, six mills on the dollar, had been levied, and that these levies were all required, and more too, for the proper maintenance of the county government, and that the maximum levy allowed by law for the succeeding year would not be sufficient to pay the ordinary cur-

rent expenses of the county, and that no part thereof could be applied to the payment of the judgment without seriously impairing the efficiency of the county government. To this answer the relator demurred. Held, that upon the facts stated in the answer and admitted by the demurrer the relator was not entitled to relief. *Clay County v. McAleer*, 115 U. S. 616, 6 Sup. Ct. Rep. 199, 29 L. Ed. 482.

Discretion of court to require judgment paid at once or in installments.

864. (*Ill.* 1887.) The Constitution of Illinois contained a provision, "any county, city, school district, or other municipal corporation, incurring any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." A judgment was obtained by the relator on bonds and interest coupons issued by the city of East St. Louis. On application for a writ of mandamus to compel the city to levy and collect a tax to pay the same, objection was made that the city could not levy and collect a tax sufficient in amount to pay the entire judgment at once. Held, that such levy should be made.

"The judgment is for interest in arrear and a small amount of principal. The law required a tax to be levied annually sufficient to pay all interest as it accrued, and the principal when due. This was neglected, and consequently there is now a large accumulation of a debt which ought to have been paid in installments. Thus far the inhabitants have been allowed to escape taxation at the times it ought to have been laid, and to which they were under constitutional obligations to submit. The accumulation of the debt was caused by their own neglect as members of the political community which had incurred the obligation. Such being the case, we see no reason why it was not in the power of the court to order a single levy to meet the entire judgment which was all for past due obligations. Whether such a tax would be so oppressive as to make it proper not to have it all collected at one time was a question resting in the

sound discretion of the court in ordering the collection. There is nothing here to show that there ought to have been a division." *East St. Louis v. Amy*, 120 U. S. 600, 7 Sup. Ct. Rep. 739, 30 L. Ed. 798.

Discrimination against creditor in manner provided for levying taxes.

865. (Mo. 1887.) When the bonds involved in this suit were issued, the laws of Missouri provided in substance that the bonds and interest thereon should be paid by a special tax to be levied from time to time, "in the same manner as county taxes." Subsequently this provision was repealed, and another enacted providing for the levy of such taxes by a materially different procedure not so prompt and efficacious as the former, and different from that provided for the levy of general county taxes. Held, that such change in the law impaired the creditor's remedy and was unconstitutional.

"It is in this vital point that the obligation of the contract with the relator has been impaired by the section of the law under which the respondent seeks to justify his disobedience of the mandate of the Circuit Court. Those sections provide one mode for the collection of county taxes by the direct action of the County Court; they provide another mode for the collection of the special tax for the payment of obligations such as those held by the relator and merged in his judgment. They expressly declare that he shall not be entitled to a tax collected in the same manner as county taxes, but add limitations and conditions which, whatever may have been the legislative motive, compared with the original remedy provided by the law for the satisfaction of his contract, cannot fail seriously to embarrass, hinder, and delay him in the collection of his debt, and which make an express and injurious discrimination against him." *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. Rep. 1190, 30 L. Ed. 1161.

Taxes levied by order of court not affected by subsequent repeal of statute.

866. (Mo. 1887.) The relator having obtained a judgment on his demands and having also obtained by the judg-

ment of the court an actual levy of a tax according to the provisions of an act then in force for the payment of his judgment, his right became vested so as not to be affected by a subsequent repeal of the statute authorizing such tax. *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. Rep. 1190, 30 L. Ed. 1161.

Office of the writ.

867. (Tenn. 1889.) "Mandamus lies to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be coerced must have the power to perform the act." *Comrs. of the Taxing District of Brownville v. Loague*, 129 U. S. 493, 9 Sup. Ct. Rep. 327, 32 L. Ed. 780.

Authority to tax implied from authority to protect the credit of the county.

868. (Mo. 1891.) In a mandamus proceeding to enforce the levy of a tax by a county to pay a judgment rendered against it on its bonds, the county contended that it had no authority to levy a tax for that purpose, but that the law only authorized the levy of one-half of one per cent. on the dollar to defray the expenses of the county. Held, that the provision in the act authorizing the issuance of the bonds upon which the judgment was rendered which empowered the county to issue the bonds authorizing it "to take proper steps to protect the interest and credit of the county," was by implication a grant of authority to levy taxes for payment of the bonds and interest thereon. *Scotland County Court v. United States ex rel. Hill*, 140 U. S. 41, 11 Sup. Ct. Rep. 697, 35 L. Ed. 351.

City's duty to pay its debts not discretionary when power exists.

869. (La. 1891.) "It has been repeatedly established, by a line of decisions both in the Supreme Court of the United States and of this State, that it is the duty of the common council of the city to budget, provide for, and pay its liabilities. Where it has been found that there had been a more extended power of taxation at the time of the contract upon which the indebtedness was founded, it has been ordered that that be resorted to and, where it has been considered that the revenues of the city were only

sufficient for the alimony, or, in other words, the running expenses, of the city for the then present year, resort has been had to future budgets, and the writ issued accordingly. But in no case has it been declared that it is within the discretion of the city government to pay or to refuse to pay its liabilities, and permit the accumulation of the same."

Cannot exhaust entire revenue on one class of disbursements.

"The legislature has declared a 10-mill tax to be sufficient to provide for the city's unbonded expenditures and liabilities, and it is not within the discretion of the council to exhaust the entire revenue with one class of disbursements, and leave the other to accumulate. In truth, it seems to be the plainly expressed intention of both legislative and judicial branches of the government to protect the city of New Orleans from the shoals and quicksands of financial embarrassment on account of any further accumulation of unfunded indebtedness."

City's expenses not beyond court's control.

"In this case it is claimed that the entire revenues of the city have been appropriated and are necessary for alimony.—the running expenses necessary for nourishing, protecting, and preserving the peace and welfare of the city. This is not conceded by relator, but it is contended that several items of appropriations are for permanent improvements, which should not be paid from the four-fifths of the revenues which are set apart for the purposes of providing for the liabilities and ordinary expenses. It is not within the province of a court to interfere with the distribution of the revenues of a city when the plain duties of its officers are performed. Nor do we assume to be vested with the power to frame a budget for the city of New Orleans, but we do consider that we are vested with the power to examine such budget, when made, and to determine therefrom the compliance or noncompliance with a plain and positive duty, when it is based upon an allegation of insufficient revenues, and an exhibit presented to substantiate such allegation. By an act of the legislature. No. 109 of 1886, it is provided that 20 per cent. of the

revenues shall be reserved for the purposes of permanent public improvements. This would necessarily imply that the other four-fifths were to be devoted entirely to the budget of liabilities and expenditures. Permanent public improvements could not, even in the absence of such legislation, be considered and deemed the necessary alimony of the city under any proper construction of that word, and this conclusion simply declares this well-established principle. Upon an examination of a copy of the budget of 1891, an exhibit filed with respondent's answer, to justify the allegation that the entire revenues are necessary for the alimony of the city, we find an item, 41, an appropriation of the amount of \$20,000, for a purpose, of which the respondents in their answer say: 'It is equally clear that a drainage machine is a permanent public improvement.' Accepting respondent's own representation of the character of this appropriation, it would certainly appear to be improperly taken from the amount claimed to be so necessary for the alimony of the city. We say nothing of several other items of appropriations which have been objected to by relator, and only accept respondent's declaration of the character of the item mentioned. All of these are doubtless proper and just, but, when they are offered as an excuse for the nonpayment of an amount incurred for the necessary alimony of the city in a past year, it seems that they should be paid from the reserve set apart for that purpose. To show that such appropriation from such portion of the revenue was not absolutely necessary, we can but refer to the exhibit of the reserve fund. This fund amounted, it appears by ordinance 4987, to \$362,060.24. Of this amount but \$165,000 was appropriated, leaving a large proportion of the reserve revenues undisposed of. We make no comment upon this further than to mention it in answer to the plea of insufficient revenues and inability to pay declared liabilities. We fail to find in the answer of respondents and the exhibit of the budget of 1891, such evidence of the necessity for the entire revenue of the city for the purpose of its alimony as would justify the neglect of a performance of a plain and declared duty." Mayor, etc., of the City of New Orleans v. United

States ex rel. Stewart, 1 C. C. A. 148, 49 Fed. 40.

Court cannot compel tax in excess of legal limit.

870. (Ind. 1892.) "A municipality cannot be compelled to levy a tax in excess of the limit prescribed by legislative authority; and if the respondent exercised the full power conferred on it by the statutes in force when the relator's bonds were issued, and its power was not enlarged by subsequent statutes, the judgment of the court below must be affirmed."

Purchaser of bonds must take notice of tax limit.

"The relators have been deprived of no right. They were bound to take notice of the limitations upon the power of the respondent to levy and collect taxes for the prompt payment of the interest and principal of the debt, and they must be held to have bought their bonds knowing just what provision had been made for their payment. They took the chance of that provision being ample, and it is their misfortune that it is not. U. S. v. County of Macon, 99 U. S. 582." United States ex rel. Spitzer et al. v. Town of Cicero, 1 C. C. A. 499, 50 Fed. 147.

Mandamus not awarded when application based on dormant judgment.

871. (Kan. 1892.) "It follows that under the Kansas statutes a judgment against a municipality will become dormant if the creditor permits a period of more than five years to elapse between the rendition of his judgment and the issuance of a writ of mandamus, or between the dates of the issuance of two successive writs of mandamus. U. S. v. Township of Oswego, 28 Fed. Rep. 55. Between the 3d day of June, 1878, and the 16th day of December, 1886, no writ of mandamus was issued upon either of these judgments, nor was any motion or application made within one year after they became dormant, or at all, to revive them. Where a judgment has been permitted to become dormant by the neglect of the creditor to issue the proper writ for five years, and no application or motion to revive is made or suit upon the judgment brought within one year after the expiration of the five years, the Supreme Court

of Kansas has uniformly held that the judgment becomes not only dormant, but dead, and no suit can be maintained upon it." Dempsey v. Township of Oswego, 2 C. C. A. 110, 51 Fed. 97, 4 U. S. App. 416.

Mandamus cannot control judgment or discretion.

872. (Colo. 1895.) "It is a fundamental rule, underlying the entire jurisdiction by mandamus, 'that in all matters requiring the exercise of official judgment or resting in the sound discretion of a person to whom a duty is confided by law, mandamus will not lie either to control the exercise of that discretion or to determine upon the decision which shall be finally given.' High, Extr. Rem., § 42, and cases cited. 'It cannot issue in a case where discretion and judgment are to be exercised by the officer.' U. S. v. Seaman, 17 How. 225, 231; Heine v. Comrs., 19 Wall. 655; id., 1 Woods, 247, Fed. Cas. No. 6325, opinion by Mr. Justice Bradley.

"In the late case of U. S. v. Lamont, 15 Sup. Ct. Rep. 97, the court say:

'It is elementary law that mandamus will only lie to enforce a ministerial duty as contradistinguished from a duty which is merely discretionary.' " Board of County Comrs. of Grand County v. King, 14 C. C. A. 421, 67 Fed. 202.

Rights of holder's of negotiable bonds and of ordinary warrants different.

873. (Colo. 1895.) "In this connection we may observe that there is a wide difference between the rights of the holders of the negotiable bonds of a county, issued under special authority of the legislature, to make subscriptions to the capital stock of railroads, or to fund floating indebtedness, or for other extraordinary expenditures, and the rights of the holders of ordinary county warrants. As we have seen, the obligation and duty to levy the tax to pay the former class of indebtedness, as provided by the act authorizing its issue, continues until the indebtedness is extinguished, notwithstanding the repeal of the statute; but in the case of ordinary county warrants there is commonly no obligation resting upon the county authorities to levy a special tax for the

exclusive purpose of paying the warrants of some particular holder thereof. When a county is authorized to levy a given rate of tax for general county purposes, no holder of county warrants or of a judgment rendered thereon has a right to demand that a special tax shall be carved out of this general rate and levied for the exclusive purpose of paying his warrants or judgment, unless the statute requires it, and leaves the county levying board no discretion. *U. S. v. Miller County*, 4 Dill. 233, Fed. Cas. No. 15,776. Any other rule would make it well-nigh impossible for a county indebted in any considerable amount to discharge its functions. Its entire revenues would be absorbed by exacting holders of its warrants, and no funds could be provided for defraying the most necessary objects of county government. In most of the States the law authorizing the issue of county warrants contemplates that they will be satisfied from the ordinary county revenue or be absorbed in the payment of the county taxes. They are not negotiable instruments, and are not intended to circulate as negotiable or commercial securities. In the case of *Supervisors v. U. S.*, 18 Wall. 71, the Supreme Court held that, under the statutes of Iowa, a mandamus could not issue to compel the county authorities to levy a special tax to pay a judgment rendered on county warrants." *Board of County Comrs. of Grand County v. King*, 14 C. C. A. 421, 67 Fed. 202.

Court cannot impart power to tax.

874. (Colo. 1895.) "A court has no taxing powers, and can impart none to the county authorities. It has no jurisdiction to coerce the levy of a tax except where the law has made it the clear and absolute duty of the proper authorities of the county to levy such tax. When the law has made it the duty of the levying court or board to levy a tax to pay a specified class of indebtedness, the Federal court in which a judgment has been rendered on that class of indebtedness may, by mandamus, compel the assessment, levy, and collection of a tax to pay such judgment; but this, say the Supreme Court, is the limit of its power." *Board of Comrs. of Grand County v. King*, 14 C. C. A. 421, 67 Fed. 202.

Mandamus lies to compel exercise of a legal power.

875. (Colo. 1896.) "Equally well settled is the further proposition that a writ of mandamus will not be issued requiring a State officer to levy a tax, or to do any other specific act, unless authority for the doing of that act can be found either in the express or implied provisions of some local statute. As was said in substance, by the Supreme Court in *Supervisors v. U. S.*, 18 Wall. 71, 77, and in *U. S. v. Macon County*, 99 U. S. 582, 591, and by this court in *Board v. King*, 32 U. S. App. 1, 14 C. C. A. 421, and 67 Fed. 202, State officers have no powers except such as have been conferred upon them by the laws of the State. They cannot be armed by the mandate of any court with an authority which they do not already possess; and no court, State or Federal, can compel a municipal corporation to levy a tax which the laws of the State do not authorize it to levy. Moreover, it is not the office of a writ of mandamus to create rights or impose duties; its sole function is to compel the performance of those duties which already exist." *Stryker v. Board of Comrs. of Grand County, Colo.*, 23 C. C. A. 286, 77 Fed. 567.

Remedy under new act passed after warrants issued.

876. (Colo. 1896.) "If, by the terms of the act, the board of county commissioners were left at liberty to determine, in the exercise of their discretion, whether in a given case a special tax should or should not be levied, a Federal court in a mandamus proceeding cannot undertake to revise or control the exercise of that discretion."

"Whether it was wise or unwise to vest boards of county commissioners with such discretionary power is not a proper subject for judicial consideration."

Several cases referred to and distinguished. *Stryker v. Board of Comrs. of Grand County, Colo.*, 23 C. C. A. 286, 77 Fed. 567; *King v. Board of Comrs. of Grand County*, 23 C. C. A. 348, 77 Fed. 583.

A duty to pay a debt enforced by mandamus.

877. (Fla. 1896.) The relator sought by mandamus against the authorities

of the city of Key West to secure payment of his judgment. Reviewing the statutes of Florida relating to the powers of the city,—Held, “The relator’s judgment debt springs out of a contract which the judgment conclusively evidences the city had lawfully made with him. We therefore conclude that, under the act of 1895, a special levy may be made by the city of Key West for payment of interest on its debt, and for sinking fund, to meet the principal of its debt, and that it is thus charged with the duty to pay the relator’s judgment, which duty can be enforced by mandamus, the necessary substitute for an execution in such cases.” *United States ex rel. Baer v. City of Key West*, 23 C. C. A. 663, 78 Fed. 88.

City having option to pay in bonds or money.

878. (Fla. 1896.) “Where the corporation debtor has an option to pay in money, or to fund in bonds, or to pay by sale of bonds, it should have an opportunity to exercise that option; and a writ of mandamus that recognizes that option, and commands the levy of a special tax to meet the debt, or the satisfaction of it by the sale of bonds, or other lawful means, would not be bad for uncertainty, or set aside for being alternative. In this case however, the respondent not only does not claim such an option but has already expressly declined to issue bonds, for this debt, or for obtaining money to pay it, and insists that it has no power to do so. It was not error, therefore, to make the mandamus absolute.” *United States ex rel. Baer v. City of Key West*, 23 C. C. A. 663, 78 Fed. 88.

Court’s discretion in requiring full payment at once or in installments.

879. (Fla. 1896.) “As the relator’s debt is all mature, and both interest and principal calling for immediate payment, which the city is in duty bound to make, and has lawful authority to raise by levy of a special tax, it would not be error in the court to require that the tax should be sufficient to meet the whole debt from the first year’s assessment and collection; but out of regard to the nature of the parties, and because even warranted levies may prove unnecessarily burden-

some, the court may exercise a sound discretion in the matter, and require full satisfaction to be made by a levy for one year, or distribute the burden over a reasonable number of years. *East St. Louis v. Amy*, 120 U. S. 600, 605, 7 Sup. Ct. Rep. 739; *Comrs. v. Loague*, 129 U. S. 493, 505, 9 Sup. Ct. Rep. 327.” *United States ex rel. Baer v. City of Key West*, 23 C. C. A. 663, 78 Fed. 88.

Power to levy tax and relator’s right determined.

880. (S. Car. 1897.) “By the act of 1891 the mayor and aldermen of the town of Darlington were given power to levy taxes without limitation for the use of the town, so that there is no question of the power to levy the tax directed by the writ. The only question is as to the petitioner’s right to have it levied to pay the judgment recovered on the coupons of its bonds. This question is settled by *U. S. v. Clark County*, 96 U. S. 211, which was followed in *Knox County Court v. U. S.*, 109 U. S. 229, 3 Sup. Ct. Rep. 131, and in *Macon County v. Huidekoper*, 134 U. S. 332, 10 Sup. Ct. Rep. 491, which cases hold that bonds and coupons of the kind sued upon by the petitioners are debts of the towns and counties issuing them, and that the holders are entitled to payment out of the general funds of the town or county raised for general use, after exhausting the special fund directed to be levied for their payment, and that, where the town or county has the power to levy a tax sufficient to pay such a debt, it may be compelled to do so by mandamus.” *Town of Darlington v. Atlantic Trust Co.*, 24 C. C. A. 257, 78 Fed. 596.

Municipal authorities have not unlimited discretion in municipal expenses as against their creditors.

881. (Nebr. 1898.) “It seems to us to be an entirely just and reasonable view that boards of county commissioners, under the laws of Nebraska, are not vested with such an absolute control over the disposition of the county revenues as will enable them to defeat the claims of judgment creditors by swelling the estimate for county expenses to such a sum as will exhaust the entire county revenue for a given year, or a series of years. If a judgment is recovered against a

county, its board of commissioners ought to make a fair effort to pay it, if need be, by cutting down to some extent the outlay for current expenses. Such expenses by judicious management, are usually capable of being reduced to some extent without serious injury to the public service; and when they can be so reduced, and a portion of the current revenue applied to the payment of judgment creditors, that course ought to be pursued, and the courts may properly require that it shall be pursued." *Deuel County, Nebr., v. First Nat. Bank of Buchanan County, Mo.*, 30 C. C. A. 30, 86 Fed. 264.

When writ awarded.

882. (Ark. 1900.) "The writ of mandamus issues only to compel the discharge of a plain duty, which the parties commanded have lawful authority to do."

To compel city to issue warrants to one of its taxpayers in satisfaction of a judgment.

"This, then, is the case in hand: The city of Little Rock owed the relator Worthen, on his judgment against it, \$35,984. The relator was entitled to payment of this judgment. The city was unable to pay it in money, but it had the power to pay it in its warrants. The relator was a taxpayer of that city, and annually paid a large percentage of its taxes; and he had the right, under the Constitution and laws of his State to pay these taxes with the warrants of his city."

Grant permissive in form, held to be mandatory.

On objection that while there was power to issue such warrants, there was no statutory requirement that they should be issued, the court adopt the ruling in 4 Wall. 435, 436, to wit:

"The conclusion to be deduced from the authorities is that where power is given to public officers in the language of the act before us, or in equivalent language, whenever the public interest or individual rights call for its exercise,—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is

given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless."

Municipality must pay if it can.

"The city of Little Rock owed the relator the amount of his judgment. It was the duty of that city to pay it. If there was any, lawful way in which the plaintiffs in error could do so, it was their duty to take that way to provide for the payment of his judgment. According to their answer, there was one way, and one way only, in which they could do this, and that was by the issue of the warrants of the city, which the relator could collect by using them in payment of his taxes. He had the right to the payment of his judgment, and under the Constitution and laws of the State of Arkansas he had the right to use the warrants of the city in the payment of his taxes. As this was the only way in which the plaintiffs in error could provide for the payment of this judgment, and as they had ample power to provide for it in this way, it was their plain duty to do so, and the court below properly commanded them to discharge that duty. Where a municipality and its officers have the power to pay a judgment against the city by the issue to the owner of the judgment of city warrants which are receivable for city taxes, and have no other way to pay it, it is their duty to issue the warrants, and the writ of mandamus will be granted to compel them to discharge that duty."

Hardship no excuse for nonpayment.

"So far as this averment was interposed as a defense to the claim of the relator to the ultimate issue of the warrants it is futile. It often increases the embarrassment of a debtor, whether public or private, to pay just obligations that have been long ignored. But the right of a creditor to the payment of his debt, and to the enforcement of that payment by all the legal remedies which the law of the land has given him, cannot be stricken down or impaired because the enforcement of that right may embarrass the debtor."

Court's discretion.

"The number of the warrants that should be issued, their respective amounts, and the time when they should be sent forth, were matters intrusted to the legal discretion of the court below. It was undoubtedly the duty of that court so to exercise that discretion that the right of the relator to the warrants should not be denied or impaired, and that no disturbance in the administration of the financial affairs of the city should be caused which was not necessary to the protection and enforcement of the right of the relator. The direction to issue numerous warrants in convenient amounts, instead of one warrant for the entire amount, was a wise and salutary exercise of the discretion of the court. It made the remedy it administered more efficient and helpful to the relator, without loss, injury or inconvenience to the city or its officers." *City of Little Rock v. United States*, 103 Fed. 418, 43 C. C. A. 261.

Failure to levy tax in former years, no excuse for refusal to levy now.

883. (S. Car. 1901.) "It is urged, however, that the authority of these officers is limited to making of an annual assessment and levy for the current year, that the year has long since been passed, and that this judgment is for the arrears of several years. The judgment has established beyond question, at least in this court, the validity of the debt and of all steps leading to it. So the duty of the township to pay the interest annually is also established. To excuse it now because it was not paid is to make it profit by its own wrong." *Hicks, County Auditor, et al. v. Cleveland*, 106 Fed. 459; *Padgett et al. v. Post*, id. 600.

Writ cannot create power.

884. (Tenn. 1901.) A mandamus cannot be awarded to compel a municipality to levy any tax which is not authorized by law.

"The office of such a writ is not to create new duties, but to compel the discharge of those already imposed by the municipal law of the State."

Construction of tax limitation.

The statutes relating to taxation by the city of Cleveland, considered and held to limit the rate of taxation for all purposes, to 75 cents on \$100.

Authority tax may be implied, when.

"Authority to levy a tax to pay debts whose creation is authorized by law, may be implied when no mode for their payment is prescribed, and there is no limitation upon the power of taxation which repels the presumption."

"But, although the debt incurred be of an extraordinary character, requiring special authority, any implication of power to levy a tax to meet the extraordinary burden will be repelled, if the act conferring the power, or any other law in force at the time, contains a provision providing for a tax to meet such obligations."

Ordinary obligations; what are.

"Expenses incurred for water furnished for public uses and for the lighting of public streets are ordinary expenses, and debts incurred for current water or lighting purposes are debts contracted within the scope of ordinary municipal purposes, and no special legislative authority is necessary to justify expenditures for such purposes."

Failure to make maximum levy in past years.

"The failure of the city to levy the full tax it might have levied for past years does not enlarge its power in subsequent years. The limitation is to a 'total levy for all general purposes in any year' of 75 cents on \$100 of the assessed values of that year. The remedy afforded by the writ of mandamus is prospective, and the failure of the city in past years to exert its entire taxing power will not justify a levy in any year in excess of the charter limitation."

Sufficiency of return to alternative writ.

A return which in substance alleged that the city had exhausted its power of taxation for the current year, by levying the maximum tax allowed by law and that the whole of such tax was essential to the maintenance of its governmental functions, and that no surplus would remain after providing for municipal necessities, was held to be sufficient as against a demurrer, though it might have been required to be made more specific on a motion for that purpose.

Control of municipal discretion.

When the amount of taxes authorized for general municipal purposes is limited by law and their appropriation is committed to the discretion of the municipal authorities, the courts will not control such discretion, by requiring payment of the relator's demand from such taxes, though any surplus remaining each year after defraying all ordinary expenses, may be required to be paid to the relator until his judgment shall be paid. *City of Cleveland v. United States*, 111 Fed. 341, 49 C. C. A. 383.

Mandamus to enforce payment of judgment; case stated.

885. (Ohio, 1902.) This was an action in mandamus to enforce the levy and collection of taxes by the village of Kent, Ohio, for the payment of a judgment rendered against the village on interest coupons of refunding bonds issued by the village.

The answer of the village alleged that the maximum levy of taxes allowed by law for all village purposes was eight mills on the dollar, that the amount accruing from such taxes was not more than sufficient for the proper maintenance of the village and payment of the ordinary current expenses necessary for carrying on the government of the village, and that no part of such revenues could be diverted for the payment of relator's judgment without preventing the village from meeting its ordinary, current, and necessary governmental expenses.

The relator demurred to this answer.

Ohio Statutes: Section 2689a limited the levy of taxes for general purposes to eight mills on the dollar.

Section 2687 authorized a greater tax, if the proposition to make such levy shall have been approved by the electors.

Section 2683 authorized the levy of taxes for twenty-three different special purposes among which was the following: (22) "To pay the interest on the public debt of the corporation and to provide a sinking fund therefor, a sum sufficient to satisfy the interest as it accrues annually, to be applied to no other purpose."

Section 2683 further provided that,

"The council shall determine the amount to be levied for each of the purposes herein, and such part thereof must be placed on the tax list and collected annually, as it shall by ordinance prescribe."

Construction of the several provisions; interest first charge on the fund.

"Assuming that the subsequent general limitation of section 2689a applies to all municipal taxation, keeping the same within the limit of eight mills in villages of the first class, we find the legislature recognizing, under other sections of the law, such as section 2701, that a corporation may incur a debt, and empowering the council to levy a sum sufficient to satisfy the interest as it accrues annually—not a part of the interest, nor such portion of the interest as the council may see fit to pay—but here is direct authority to levy a sum sufficient to satisfy the interest; and it is made apparent that this sum, which must be equal to the interest due, is not to be apportioned among other municipal purposes, for we find the provision that this sum shall be applied to no other purpose. In other words, a distinct fund is here authorized to be raised sufficient to pay the interest on a public debt, not to be diverted or divided among other purposes, but, in terms, directed to be applied to this specific purpose. It is true that in subdivision 24 the council is authorized to determine the amount to be levied for each of the purposes specified in section 2683. These purposes are manifold, and the sums required may be more or less as the council may see fit to determine, as so much for highways, so much for bridges, so much for lighting, erection of schools, etc.; but in authorizing the levy to pay the interest no such discretion is required or permitted to be exercised, but the levy is to be of a sum sufficient to satisfy the interest as it accrues annually. We think it plain that the discretion vested in the council to determine the amount to be levied for each purpose does not apply to a purpose, such as the payment of inter-

est, which is merely a matter of mathematical calculation, not required to be fixed by the exercise of discretion on the part of the council. It is true, this section does not say the village shall levy a tax for this purpose; and it is argued that this statute is merely an enabling one, to permit the council to levy as much for this purpose as they shall see fit. But it is well-settled in statutory interpretation that the word "may" may be read "shall."

Sufficient additional tax to meet current expenses may be authorized by electors.

Referring to section 2687, after distinguishing a number of cases cited by council for plaintiff in error:

"In our judgment, this section is a complete answer to the applicability of those cases which preserve the public revenue for general in preference to debt-paying purposes. We here find power given without limit to levy a tax for any of the purposes mentioned in the chapter, upon the approval of a majority of the electors of the corporation. It cannot, therefore, be said that the corporation has exhausted its tax-levying power, and must stop the wheels of its administration if the fund is to be appropriated for the payment of debts. Electors of the corporation are the real parties in interest. They have never been appealed to, and it is within their power to direct the levy of taxes for the necessary purposes of the corporation, as well as to meet its legal indebtedness." *Village of Kent v. United States*, 51 C. C. A. 189, 113 Fed. 232.

Mandamus substitute for execution.

886. (Neb. 1903.) "In the enforcement of judgments of the national courts against municipal and quasi-municipal corporation, the writ of mandamus is the legal substitute for the writ of execution to enforce judgments against private parties. The plaintiff in a judgment of the former class has the same right to the issue and enforcement of a mandamus commanding the proper officers of the defendant corporation to make suit-

able provision for its payment that the plaintiff in a judgment of the latter class has to the issue and enforcement of a writ of execution. In *re Nevitt*, 117 Fed. 449, 454, 54 C. A. 622, 628; *Lafayette Co. v. Wonderly*, 92 Fed. 313, 316, 34 C. A. 360, 363; *Dempsey v. Osvego Tp.*, 51 Fed. 97, 99, 2 C. C. A. 110, 112."

Public officers compelled to do what they are empowered to do.

"Of course, neither a mandamus nor an execution may require the officer or officers to whom it is addressed to do any act which he or they have not lawful authority to do. But the legal duty is always imposed upon them to exercise all the authority with which they are invested to collect the judgments upon which such writs are issued, and the courts may and should command and enforce the performance of this duty. Whatever public officers are empowered to do for the benefit of private citizens the law makes it their duty to perform whenever public interest or individual rights call for the performance of that duty. *Supervisors v. United States*, 4 Wall. 435, 446, 18 L. Ed. 419; *City of Little Rock v. United States*, 103 Fed. 418, 424, 43 C. C. A. 261, 267."

Previous demand to levy tax unnecessary, when.

"The demand of payment of this judgment was sufficient to sustain this proceeding for a mandamus to compel a levy of a tax to raise the money to discharge it, and no formal demand to make such a levy was required before the proceeding was instituted, (1) because where the statute imposes the duty to make provision for payment of a judgment against a city upon its officers, and authorizes the issue of a writ of mandamus to compel them to levy a tax in case of their failure to make such provision, a demand of payment is equivalent to a demand of a levy, if such a levy is necessary (*City of Cairo v. Everett*, 107 Ill. 75, 78); (2) because no demand of a levy of a tax is requisite where the duty to levy it is imposed by the statute

(Cherokee County Commissioners v. Wilson, 109 U. S. 621, 625, 3 Sup. Ct. 352, 27 L. Ed. 1053; Deuel Co. v. First Nat. Bank, 86 Fed. 264, 267, 30 C. C. A. 30, 33; County Commissioners v. King, 13 Fla. 451, 461), or where the duty is plain, (High's Extraordinary Legal Remedies, 377b; State v. City Council of Racine, 22 Wis. 258, 260; Fisher v. City of Charleston, 17 W. Va. 595); and (3) because no demand is necessary where it is manifest that it would be an idle ceremony (United States v. Auditors of Town of Brooklyn (C. C.) 8 Fed. 473)."

General tax ordered to pay bonds for which special assessments are levied.

In this case it was contended that "district paving bonds" and "district curbing and guttering bonds" issued by a city of Nebraska were payable solely from special assessments provided for in the statutes of that state and that there was no legal authority to levy a general tax for the payment of such bonds. Held that there was authority to levy such general tax. The laws bearing upon the question and the rules of construction in such cases discussed. *United States v. Saunders*, 59 C. C. A. 394, 124 Fed. 124.

Mandamus to enforce payment of judgment; taxpayer not proper party; nature and office of the writ.

887. (Ohio, 1903.) "The question, then, is whether in a mandamus proceeding to enforce a judgment against a municipality, any taxpayer is entitled to intervene, and go back of the judgment, and reopen, the case, simply because he was not a party to the original suit. If he is, then, to make such a judgment effective, not only every existing, but every prospective, taxpayer must be made a party. Of course, this could never be done, and therefore a conclusive judgment never obtained. Each time the writ of mandamus issued to enforce the judgment, a new taxpayer would be found to open it up and relitigate the case. The supposed right of a taxpayer to intervene flows from a misconception both of

the nature of the obligation upon the bonds and of the character of the mandamus proceedings to enforce the judgment. The obligation is not that of the taxpayers, but of the corporation. No one would have bought a bond to which every taxpayer was a party and against which each might set up a defense. The purchaser relied upon the faith of the corporation. The suit, therefore, was brought against the corporation, and judgment recovered against it. The mandamus proceeding is purely ancillary in character. It is not a new suit against the taxpayers. It is a mere substitute for the ordinary process of execution to enforce the judgment. *Riggs v. Johnson County*, 6 Wall. 166, 198, 18 L. Ed. 768." *Kinney et al. v. Eastern Trust & Banking Co.*, 59 C. C. A. 586, 123 Fed. 297.

Mandamus a legal proceeding in nature of execution to enforce judgment.

888. (Kan. 1904.) "Mandamus is a legal, and not an equitable, proceeding, and a mandamus after a judgment to compel the levy of a tax is in the nature of an execution to enforce satisfaction. *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *Heine v. The Levee Commissioners*, 19 Wall. 655, 660, 22 L. Ed. 223."

Review of judgment awarding writ must be by writ of error.

"A proceeding to review a judgment awarding such a writ must be by a writ of error. This point was expressly decided by this court in *Muhlenberg County v. Dyer et al.*, 65 Fed. 634, 13 C. C. A. 64, upon the authority of *Ward v. Gregory*, 7 Pet. 633, 8 L. Ed. 810; *Insurance Co. v. Wheelright*, 7 Wheat. 534, 5 L. Ed. 516; and *United States v. Addison*, 22 How. 174, 185, 16 L. Ed. 304. The time having elapsed within which a writ of error may issue, we are unable to now correct the error in praying an appeal when a writ of error should have been allowed." *Carter County v. Schmalstig*, 62 C. C. A. 78, 127 Fed. 126.

Enforcement of judgment against town; sufficiency of petition for.
 889. (R. I. 1906.) Mandamus to compel a levy of tax to pay a judgment rendered against a town on its bonds.

"But it is not for the respondents to object that the remedy sought by the petitioner is incomplete. If the writ here prayed for be treated as a necessary part, but only a part, of the execution to which the petitioner is entitled, the writ should not be denied because all the remedy is not given at once. Mandamus to a town officer does not issue as of course wherever an execution against the town remains unsatisfied. It issues only to compel a town officer to do those acts which the law requires of him toward the payment of the judgment. If the law imposes upon him no duty in the matter, the writ will not issue against him. Conversely, the writ will not be denied, because his statutory duty does not extend to the full satisfaction of the execution. The writ will issue to compel him to do his duty to that end, be his part in the operation large or small. 'Assuming that the return is true in fact, does it excuse the board of county commissioners from the performance of so much of the command of the writ as ordered them to collect and pay over, as well as to levy, the taxes to pay relator's judgment? The excuse offered is, in brief, that, although commanded to levy, collect, and pay over, the respondents are powerless to do more than levy, since the law devolves the duty of collecting and paying over upon another officer of the county, the treasurer, who can only act upon tax rolls to be prepared by the county clerk. The office, and the only office, of the writ of mandamus, when addressed to a public officer, is to compel him to exercise such functions as the law confers upon him. When the law enjoins upon such an officer the performance of a specific act or duty, obedience to the law may, in the absence of other adequate remedy, be enforced by this writ.' United States v. Labette County (C. C.) 7 Fed. 318, 320."

When writ of mandamus will issue; its office; tax limitation.

Conclusiveness of judgment on bonds.

"We come next to the principal question raised in this case: Has the petitioner a right to the levy of a tax by the town in order to pay his judgment? That is the purpose of the writ and of the town meeting. He has recovered a judgment against the town. His debt is thus determined to be due and payable, founded upon a just contract. From the existence of the debt arises the presumption of the right to payment. When authority is granted by the legislative branch of the government to a municipality, or a subdivision of a state, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred, is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention. The power to tax is necessarily an ingredient of such a power to contract, as, ordinarily, political bodies can only meet their pecuniary obligations through the instrumentality of taxation.' *Ralls County Court v. United States*, 105 U. S. 733, 735, 736, 26 L. Ed. 1220. The Supreme Court has held, however, that a municipality may owe a debt, that judgment may be recovered thereupon, and yet that the municipality may be forbidden to raise money for its payment by the ordinary means of raising money, viz., taxation. *United States v. Macon County*, 99 U. S. 582, 25 L. Ed. 331. Liability in theory may thus be established by the judgment; the right to take out execution may follow thereupon; the execution may be ineffective, and yet the writ of mandamus may be denied, although the writ is held to discharge the function of an execution in suits against municipalities. Thus it has been said: 'There is no necessary connection between the power to contract debts and the power to levy taxes to pay them.' *Board of Commissioners v. King*, 67 Fed. 202, 205, 14 C. C. A. 421.

"While this anomalous condition is well recognized, two things are to be observed concerning it: First, where there is a debt, authority to tax is presumed in the absence of some express provision to the contrary. Authority to contract a debt carries with it authority to tax, unless authority to tax is expressly denied. *Ralls County Court v. United States*, 105 U. S. 733, 26 L. Ed. 1220; *Citizens' Association v. Topeka*, 20 Wall. 662, 22 L. Ed. 455; *United States v. New Orleans*, 98 U. S. 381, 393, 25 L. Ed. 225; *United States v. Saunders*, 124 Fed. 124, 128, 59 C. C. A. 934. Second, as the only effective limitation is upon the right to tax, the respondents' return or answer must show not only that this limitation exists, but that the limited authority to tax has been exhausted. *City of Cleveland v. United States*, 111 Fed. 341, 348, 49 C. C. A. 383; *Beaulieu v. Pleasant Hill (C. C.)* 14 Fed. 222.

"Applying these considerations to the case at bar, we find that the judgment has established a valid contract and debt. *Harshman v. Knox County*, 122 U. S. 306, 316, 7 Sup. Ct. 1171, 30 L. Ed. 1152. The only legislation referred to contains no express limitation of the town's authority to tax." *Rose et al. v. McKie*, 76 C. C. A. 274, 145 Fed. 584.

Mandamus to compel tax levy to pay, judgment on railroad aid bonds.

890. (Ky. 1906.) The act authorizing the railroad aid bonds provided that: "An annual tax sufficient to pay the interest on said bonds and the principal when it shall become due shall be levied and collected and paid out by the officers of said county as provided in case of other county taxes: Provided, that said company shall make a preliminary survey of its route within one year after the passage of this act and shall commence work, in good faith, upon its roadbed within the next year, and shall each year thereafter perform one-fifth of the work necessary to complete said road."

"And the first point made for the plaintiff in error is that the conditions contained in the proviso have never been performed, and that there-

fore the fiscal board has no authority to levy the tax. But it is clear from the provisions of the act that the duty of levying the tax was dependent upon the issue of the bonds and consequent upon it. The question whether a tax should be levied depends upon the inquiry whether the bonds have been issued in such manner as to bind the county, and, if such inquiry has been settled in the affirmative, there is no new and independent question to be considered before the duty to levy the tax becomes imperative; in other words, the provisions of section 10 do not afford new standing ground for another inquiry into the validity of the bonds." *Estill County, Ky., v. Embry*, 75 C. C. A. 654, 144 Fed. 913.

Mandamus; remedy of judgment creditor of a municipal corporation, as affected by tax limitations.

891. (Tenn. 1907.) "This cause is now here for the fourth time. On the first occasion, it was brought up on an appeal by the complainant from a decree of the Circuit Court dismissing the bill. The decree was reversed, with directions to enter a decree for the complainant for the full amount claimed by the bill, with interest and costs. The decision of this court was of the date of December 9, 1899. The facts of the case and the opinion of the court were reported in 98 Fed. 657, 39 C. C. A. 211. Pursuant to the mandate, on April 11, 1900, a decree was entered in the Circuit Court in favor of the complainant for the sum of \$9,852.12 and costs. Execution was issued thereon and returned nulla bona. On July 11, 1900, the complainant filed a petition in the Circuit Court praying for a mandamus to compel the city to levy and collect a sufficient tax and therewith to satisfy the decree. To an alternative writ the city returned that it had already assessed a tax for that year of seventy-five cents on each \$100 for the maintenance of its municipal functions, that this assessment was the limit of its power of taxation under its charter, and that no surplus would remain after applying the amount assessed to the necessities of the city government. The complainant demurred to this return,

and the demurrer was sustained; the court being of opinion that the city had power, and it was its duty, to levy a special tax, notwithstanding the limitation of seventy-five cents on the \$100, which the court thought was a limitation upon its power to tax for ordinary municipal purposes. The court was further of opinion that the return was insufficient in that it failed to state the purposes for which the general tax had been levied. A judgment was entered in accordance with this opinion, and the defendant sued out a writ of error to this court. It was here held upon consideration of the relevant provisions of the city's charter that the Circuit Court was in error in holding that the aforesaid limitation did not exclude the power to levy a special tax to satisfy the decree; and we reversed the judgment. But on doing this we indicated to the Circuit Court our opinion in respect to the judgment which that court should enter. The case, as then presented, and the opinion of this court, are reported in 111 Fed. 341, 49 C. C. A. 383. As the judgment which we then indicated as the proper one was made the judgment of the Circuit Court upon the reception of the mandate, and was, and still continues to be, the guide for subsequent proceedings, we here set forth a copy of so much thereof as is now material:

"That the defendant below be directed to pay over any surplus which may remain from the proceeds of the total levy made for all purposes in 1900, after defraying the current expenses chargeable upon the ordinary revenue of the city, and that it make a further return showing the amount of the tax so collected, and how same has been applied. That the defendants below be commanded to levy for each year succeeding the entry of this judgment the full tax of seventy-five cents on the \$100 of assessable city property, and the full poll and privilege taxes permitted by the charter of 1893, until the judgment of relator, with interest and costs, shall be fully paid; and, after defraying all ordinary expenses payable out of the revenue so raised each year, it will pay over to the relator

any surplus remaining each year, until his judgment shall be paid, and that it make all such other returns as shall be required by the court below, showing how it has obeyed this judgment."

The following paragraphs appear in a somewhat lengthy and interesting statement of the case:

"Counsel for the relator contends that these appropriations for additions to the school building were not justified as against him for the reason that section 21 of the charter authorized the city to borrow money and issue its bonds therefor to erect public buildings, and that it was its duty to avail itself of that power, if it had not enough to pay its other obligations falling due. We are strongly inclined to think this point is well taken: It seems probable that the Legislature contemplated just such a situation as this as likely to happen. The building of such large structures would necessarily involve the use of large sums of money, several times larger than the municipality was authorized to raise for its current annual expenses, which for those purposes were meager enough already. It is true it was a grant of authority, and it may be said that a discretion existed. But, if the city owed an honest debt which it could not otherwise pay, it would seem to be due to the owner of that debt that the discretion should be exercised in his favor. *Supervisors v. United States*, 4 Wall. 435, 18 L. Ed. 419; *City of Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560; *Deere v. Commissioners*, *infra*. During the years 1901 and 1902, the city disbursed for these new buildings \$4,673 out of funds which were raised for ordinary expenses, and therefore applicable to the debt due the relator, if not necessary for current use. We think he had a lawful right to expect this, and that if, after paying its ordinary expenses, it should have no funds to erect school buildings, the city should exercise its power under the statute providing for raising funds for that purpose, if, indeed, there was a real necessity. It was not a case where the city would have to appropriate its ordinary revenues to erect school

buildings or go without. No such necessity could be appealed to in order to justify the city in withholding from the relator the debt due him and defeating his just ex-

pectation that the city would in good faith exercise its powers in such a way as to pay him." *Cunningham v. City of Cleveland, Tenn.*, et al., 82 C. C. A. 55, 152 Fed. 907.

3. *Res Judicata*; To What Extent Parties are Concluded, in Mandamus Proceedings, by Former Adjudications.

No collateral attack of judgment.

892. (Ill. 1866.) On application for a writ of mandamus to compel the payment of a judgment, the correctness of the judgment cannot be questioned, it can be impeached only in a proceeding had directly for that purpose. *Supervisors v. United States ex rel.*, 4 Wall. 435, 18 L. Ed. 410.

To the same point, see *City of Little Rock v. United States*, 103 Fed. 418, 43 C. C. A. 261.

Conclusiveness of judgment as to right to have tax levied to pay the debt.

893. (La. 1878.) "In the present case, the indebtedness of the city of New Orleans is conclusively established by the judgments recovered. The validity of the bonds upon which they were rendered is not now open to question. Nor is the payment of the judgments restricted to any species of property or revenues, or subject to any conditions. The indebtedness is absolute. If there were any question originally as to a limitation of the means by which the bonds were to be paid, it is cut off from consideration now by the judgments. If a limitation existed, it should have been insisted upon when the suits on the bonds were pending, and continued in the judgments. The fact that none is thus continued is conclusive on this application that none existed." *United States v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225, 227, 228.

Conclusiveness of judgment in mandamus proceedings.

894. (Mo. 1881.) "In the return to the alternative writ many defenses were set up which related to the validity of the coupons on which the judgment had been obtained, as obligations of the county. As to all these defenses, it is sufficient to say it was conclusively settled by the judgment which lies at the foundation of the

present suit, that the coupons were binding obligations of the county, duly created under the authority of the charter of the railroad company, and, as such, entitled to payment out of any fund that could lawfully be raised for that purpose." *Ralls County Court v. United States*, 105 U. S. 733, 26 L. Ed. 1220, 1223; *Lewis v. Comra.*, 105 U. S. 739, 26 L. Ed. 993.

Former injunction in state court against levying taxes at suit of taxpayers.

895. (Ill. 1883.) "The relator was not a party to the suit in which the injunction was obtained, and, consequently, is not bound by it. Having established her right to the tax by the judgment of the Circuit Court in a suit to which the town in its corporate capacity was a party, she may use the power of that court to command the assessment and collection of the tax as a means of carrying the judgment into execution, notwithstanding what the taxpayers may have caused to be done in some proceeding to which the relator was not a party. The right to the computation and assessment, as well as the collection of the tax, followed as a matter of law from the establishment of the liability of the town for the payment of the interest which it was agreed should be made by the assessment and collection of the tax. An injunction against the officers before the judgment against the town was rendered cannot stand in the way of the enforcement of the tax by the Circuit Court to carry its judgment into execution." *Hawley v. Fairbanks*, 108 U. S. 543, 2 Sup. Ct. Rep. 846, 27 L. Ed. 820.

Former judgment in state court conclusive.

896. (Ohio, 1883.) In this case it was held that a judgment of the Supreme Court of Ohio, rendered in a mandamus

proceeding to enforce the levy of a tax to pay the bonds in suit, holding the bonds to have been issued without legal authority was conclusive. *Louis v. Brown Township*, 109 U. S. 162, 3 Sup. Ct. Rep. 92, 27 L. Ed. 892.

Examination of original cause of action.

897. (La. 1884.) On an application for a writ of mandamus to compel the payment of a judgment it is competent for the court to inquire into the cause of action on which the judgment was rendered when the judgment creditor prayed for the enforcement of the judgment by proceedings which were authorized by legislation existing at its date, but subsequently repealed.

"Whether such repeal was effectual to deprive him of the process prayed, depended upon the question whether the judgment was founded upon a contract, the obligation of which the State was prohibited from impairing."

"The inquiry, however, which may be thus instituted into the nature of the original cause of action, does not where the judgment was rendered upon a contract authorize a re-examination of the validity of the contract, or of the propriety of the judgment. That would involve a retrial of the case. Here the inquiry disclosed the fact that the judgment of Nelson was founded upon treasury warrants issued by the Parish of St. Martin, in favor of the municipal authorities of New Iberia, for \$4,500, for the building of a bridge over a bayou within the limits of the corporation, made payable out of certain funds, the proceeds of taxes for particular years. It may be that the funds mentioned were merely such as the authorities intended to apply to the payment of the warrants, and were not designed to be any limitation upon the right of the holder to payment for the construction of the bridge if such funds did not exist. So the District Court would seem to have thought, as its judgment was general, that the plaintiff recover the amount absolutely from the parish, and this judgment had become final before the application for the writ of mandamus. The absolute liability of the parish upon such warrants was therefore no longer an open question, and the inquiry whether the judgment was founded upon a contract was answered. Further testimony on the subject was irrelevant and incompetent.

The Supreme Court, however, held that the designation of the funds out of which the warrants were to be paid rendered the parish liable only if the funds were sufficient, notwithstanding the terms of the judgment. Its conclusion in this respect was wholly unauthorized, because founded upon evidence which it could not legitimately consider. The judgment being absolute, and the plaintiff therein being by law entitled at the time to a decree that the assessing and collecting officers of the parish should assess and collect a tax sufficient to pay it, and such decree having been entered, and those officers having failed in their duty, the relator was entitled to the writ prayed.

"The Code of Procedure of Louisiana declares that the writ may be directed to public officers to compel them to fulfill any of the duties attached to their office, or which may be legally required of them. Article 834.

"There can be no doubt, therefore, that under this law the writ should have been granted. The position of the court that the relator was not entitled to the writ because the decree accompanying the judgment contemplated a levy of the tax in 1873 according to the assessment-roll of that year, is without force. He was entitled, and the party succeeding to his interest is entitled to a writ commanding the levy and collection of a sufficient tax to pay the judgment, according to the assessment-roll of the year in which the levy is made, at any time until the judgment is satisfied; the right to demand the tax not depending upon the valuation of the taxable property for any year for general purposes. Such right was not only assured by the law in force when the contract was made, but was expressly declared in the decree accompanying the judgment and forming part of it. It is difficult to conceive a plainer case for the relief prayed." *Louisiana ex rel. Nelson v. Police Jury of St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. Rep. 648, 28 L. Ed. 574.

Conclusiveness of judgment.

898. (Mo. 1886.) This was a proceeding in mandamus to compel the levy of a tax to pay a judgment against a county upon its bonds. Concerning the validity of the bonds the court say: "If any question could have been made as to their validity, it is

concluded by the judgment which is the foundation of the present proceeding. The only question now before us is whether the relator is entitled to have a tax levied upon any property other than real estate lying within the township." *Cape Girardeau County Court v. Hill*, 118 U. S. 68, 6 Sup. Ct. Rep. 951, 30 L. Ed. 73.

Judgment conclusive as to relator's right to tax.

899. (Mo. 1887.) A general statute of Missouri authorized counties to issue bonds to aid in the construction of railroads upon a favorable vote of the electors, and when bonds were so issued, authorized taxes to be levied for their payment without limit as to amount. The act incorporating the M. & M. Railroad Company authorized counties to issue bonds in aid of its construction without such vote, and limited taxes to be levied for payment to one-twentieth of one per cent. of the taxable property of the county. Bonds were issued by Knox county purporting to have been issued under the latter statute and judgment was obtained upon them against the county; but in the petition it was alleged that they were issued under the general law, and the county being in default, judgment was rendered accordingly.

In a mandamus proceeding to enforce the levy of a tax to pay the judgment, it was held that as to such matter the judgment was conclusive of the relator's right to a levy under the general law, notwithstanding it was shown that the bonds referred to the other law as authority for their issuance.

A number of authorities noticed in the opinion. *Harshman v. Knox County*, 122 U. S. 306, 7 Sup. Ct. Rep. 1171, 30 L. Ed. 1152.

Judgment on demurrer as res adjudicata.

900. (Kan. 1888.) A final judgment entered upon a demurrer to a pleading is a bar to any further action upon the specific claims in suit. Their validity cannot be again litigated in any form between the parties.

"The question for determination in this case relates to the effect of the former judgment upon the present action, which is upon different coupons, though attached to the same series of bonds. Does that judgment preclude any inquiry as to the validity of these

latter coupons, that is, of the bonds to which they are attached?

"If the fact admitted by the demurrer in the former action that the signature of the county clerk, appearing on the bonds of the township, was not signed by him, or by any one authorized by him—had been found by a jury, or been admitted in open court by the plaintiff, there is no doubt that the judgment thereon would have been conclusive in any other action between the same parties in which the validity of those bonds was drawn in question. It would have been an adjudication, both upon the fact established and upon the law applicable to the fact, concluding future litigation upon those matters. Is the litigation any the less concluded because the fact upon which the judgment rested was established by the demurrer?" Held, that such former judgment was decisive of the fact admitted by the demurrer. *Cromwell v. County of Sac*, 94 U. S. 351, distinguished. *Bissell v. Spring Valley Township*, 124 U. S. 225, 8 Sup. Ct. Rep. 495, 31 L. Ed. 411.

When court may look through a judgment to the original cause of action.

901. (Tenn. 1889.) This was a proceeding in mandamus to enforce the payment of a judgment.

"Under the legislation between the issue of the bonds in 1870 and this application in March, 1886, authority to levy taxes to pay debts of the character represented by these judgments, when uncompromised, did not exist at the latter date, so that plaintiff was remitted, in the assertion of the right to that remedy, to the time when the bonds were issued, and as the city had then no power to tax to pay them other than that derived from the act of February 8, 1870, the relator by his pleadings opened the facts which attended the judgments for the purpose of counting upon that act as furnishing the remedy which he sought. In this he in effect asked the court to order the levy of a tax to pay the coupons, and relied on the judgments principally as creating an estoppel upon a denial of the power to do so.

"Thus invited to look through the judgments to the alleged contracts on which they are founded, and finding them invalid for want of power, must we nevertheless concede to the judgments

themselves such effect, by way of estoppel, as to entitle the plaintiff *ex debito justitiæ* to a writ commanding the levy of taxes under a statute which was not in existence when these bonds were issued?" Held, that "When the relator is obliged to go behind his judgments as money judgments merely, to obtain the remedy pertaining to the bonds, the court cannot decline to take cognizance of the fact that the bonds are utterly void and that no such remedy exists." Held, also, "where application is made to collect judgments by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever." *Harshman v. Knox County*, 122 U. S. 306, 319, distinguished. *Comrs. of the Taxing District of Brownville v. Loague*, 129 U. S. 493, 9 Sup. Ct. Rep. 327, 32 L. Ed. 780.

Judgment fixes rights of parties.

902. (Kan. 1889.) "A proceeding by mandamus to compel the levy of a tax to pay a judgment is in the nature of execution. The rights of the parties to the judgment, in respect of its subject-matter, were fixed by its being rendered. If the prosecution of writs of error to the execution of process to enforce judgments is permitted when no real ground exists therefor, such interference might become intolerable." *Chanute City v. Trader*, 132 U. S. 210, 10 Sup. Ct. Rep. 67, 33 L. Ed. 345.

Under which statute issued, properly determined by the judgment in an action on the bonds.

903. (Mo. 1893.) The question of whether railroad-aid bonds were issued solely under an act incorporating the railroad company, which provided for a limited rate of tax for their payment, or under a general law in pursuance of a vote of the people and payable without restriction as they fell due as to amount of tax for their payment is a matter properly determinable in a suit on the bonds, and one to be finally settled by the judgment therein. *Harshman v. Knox County*, 122 U. S. 306, cited.

How such question to be properly determined? *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. Rep. 267, 37 L. Ed. 93.

Judgment conclusive.

904. (La. 1891.) "The question as to whether the debt for the collection of which a mandamus was prayed was a liability of the city of New Orleans or not has been determined by the judgment. If there could have been any defense made to the action on account of the debt having been contracted for the purposes of the year 1882, and not paid from the revenues of that year, and therefore involving the accumulation of an indebtedness such as was prohibited by the act of 1877, it should have been made at the trial of the cause in the court below." *Mayor, etc., of the City of New Orleans v. United States ex rel. Stewart*, 1 C. C. A. 148, 49 Fed. 40.

Conclusiveness of judgment as to liability of defendant.

905. (La. 1894.) In a mandamus proceeding to enforce the payment of a judgment against a municipal body such judgment is conclusive as to the liability of the body for the debt. *Police Jury of Jefferson v. United States ex rel. Fisk*, 8 C. C. A. 607, 60 Fed. 249.

Holder of warrants acquires no additional right to tax by reducing claim to judgment.

906. (Colo. 1896.) "Now, in view of the provision limiting the rate of taxation for ordinary county revenue to ten mills on the dollar, found in the act of March 20, 1877, it is obvious, we think, that the legislature did not intend to declare that, if the holder of warrants issued for ordinary county expenses saw fit to reduce them to a judgment, instead of waiting for their orderly payment in the mode provided by law, it should thereupon become the duty of the board of county commissioners to levy a tax for the special benefit of the judgment creditor, adequate to pay his judgment, and to make such a levy although it raised the rate of taxation for ordinary county expenses to a sum exceeding the limit of ten mills on the dollar." *Stryker v. Board of Comrs. of Grand County, Colo.*, 23 C. C. A. 286, 77 Fed. 567.

Judgment conclusive as to constitutional debt limit.

907. (Colo. 1897.) After a claim has been reduced to judgment, it is too late to maintain the objection that the debt exceeded the constitutional limitation.

"Whenever a corporation seeks to do an act by means of the judgment of a court, or is charged in a court with default in the performance of one of its contracts, the first question the court must hear and determine is whether the act or contract was within the powers vested in the corporation through its franchise. Nor does the rightfulness of its decision of this question affect the conclusiveness of its judgment." Board of County Comrs. of Lake County v. Platt, 25 C. C. A. 87, 79 Fed. 567.

Determination in former mandamus proceeding conclusive.

908. (Neb. 1897.) In a mandamus proceeding to compel the officers of Holt county, Neb., to collect and pay over a tax which theretofore had been levied by order of the court to pay the judgment of the relator, it was urged that the tax so levied was in excess of the legal limit. Held, that the matter was *res adjudicata*.

"It is not material that the school district and its officers failed to interpose the defense now urged in that action. It is a universal rule that in an action between the same parties, or those in privity with them, upon the same claim or demand, a judgment upon the merits is conclusive, not only as to every matter offered, but as to every admissible matter which might have been offered to sustain or defeat the claim or demand." Holt County v. National Life Insurance Co. of Montpelier, Vt., 25 C. C. A. 409, 80 Fed. 686.

State court cannot prevent enforcement of judgment of federal court.

909. (Neb. 1897.) "A State court cannot, by injunction, prevent a Circuit Court of the United States from enforcing its judgment by a mandamus to compel the levy and collection of a tax to pay it. Riggs v. Johnson

County, 6 Wall. 166; Supervisors v. Durant, 9 Wall. 415; Hawley v. Fairbanks, 108 U. S. 543, 2 Sup. Ct. Rep. 846." Holt County v. National Life Insurance Co. of Montpelier, Vt., 25 C. C. A. 409, 80 Fed. 686.

Questions determined by former judgment.

910. (Ky. 1898.) "The answer offered by defendants presented only questions of law, and objections which sought to go behind the judgment and open up the case, and there was no error in refusing to allow it to be filed. The legal questions, as to which plaintiff in error is not concluded by the judgment recovered, will be considered further on. But questions affecting the validity and correctness of the judgment were not open in this proceeding. Chanute City v. Trader, 132 U. S. 210, 10 Sup. Ct. Rep. 67; Harshman v. Knox County, 122 U. S. 306, 7 Sup. Ct. Rep. 1171; Mayor v. Lord, 9 Wall. 409; United States v. New Orleans, 98 U. S. 381." Fleming v. Trowsdale, 29 C. C. A. 106, 85 Fed. 189.

Conclusiveness of judgment.

911. (S. Car. 1901.) "Before entering upon an examination of the other assignments of error, we assume that the judgment upon which this mandamus is based is conclusive as to the validity of the bonds, and of the contract under which they were issued. Harshman v. Knox County Court, 122 U. S. 316, 7 Sup. Ct. Rep. 1171, 30 L. Ed. 1151. Being coupon bonds payable to bearer, they are negotiable instruments (Gelpeke v. City of Dubuque, 1 Wall. 175, 17 L. Ed. 520); and they and their coupons are protected by all the legislation existing at their creation and their date of issue, and this protection follows them in the hands of every bona fide holder for value. The judgment is also conclusive as to the fact that the plaintiff at law was a bona fide holder for value of the coupons sued upon. Township of Ninety-Six v. Folsom, 30 C. C. A. 657, 87 Fed. 304; Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; City of San Antonio v. McHaffy, 96 U. S. 312, 24 L. Ed. 816."

THE ABOVE-SIGNED INVESTIGATOR
AND DEPUTY-ATTORNEY GENERAL OF CALIFORNIA
BEFORE THE VALIDITY OF THE PROSECUTION TO
OBTAIN WHICH THE FOREGOING DEEDS
IT IS NOW THE DUTY OF THIS OFFICE TO
TAKE NOTE AT THIS TIME THAT PROSECUTION
IS IMPROPER. IT IS ALSO THAT THE
FOREGOING PROSECUTION IS UNLAWFUL
AS TO THE CONSTITUTIONALITY OF THE LAW
WHICH MAKES SUCH DEEDS VALID. HENCE
THE DEEDS OF A. & C. WARDEN
AND THE DEEDS OF A. & C. WARDEN
AND THE DEEDS OF A. & C. WARDEN

1. Importance of the subject
 2. How it is related to the subject
 3. How it is related to the subject

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Business International To Judge In
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the district, various measures of the district together with the receipt of some amount of the county government and subject to some irregular some further measure in the district in which the measure was proposed.

"That it is provided that the board of supervisors and the commissioners were not parties to the former action, and were therefore not prejudiced by the judgment, and that they now have the right to make known all the persons who could now be made in the original action. V. cannot make in this connection. The judgment in the former action established the right of the defendant in error against the trustees district. All the persons parties in that action were before the court, and there was no denial of parties defendant. The present proceeding is not a new action to establish the right of the defendant in error as against other parties. It is a proceeding in the nature of an application to enforce the judgment already rendered. The right of the defendant in error to call upon the board of directors to enforce the judgment was established in that judgment, as well as his right to have payment to the board of supervisors. It was the refusal of the board of directors to make the payment. Neither the board of directors nor the board of supervisors nor the trustees of the Farmers Insurance Company can be made to answer the present proceeding in any of the grounds invoked, or which might now be invoked, in the former action. Board of Supervisors of Jefferson County v. Thompson, 55 C. 2, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

2. The following are the names of the persons who are members of the Board of Directors of the Corporation:

**DECLARATION IN SUPPORT OF THE RESPONSIBILITY
OF MANAGEMENT**

1. I have the honor to acknowledge the receipt of your letter of the 11th inst. in relation to the above matter. I am sorry that I cannot give you a more definite answer at this time, but I am sure that you will understand the necessity of this delay. I am, however, sure that you will be satisfied with the result of my investigation. I am, Sir, very respectfully,
Yours truly,
J. H. [Signature]

THE UNITED STATES DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF STAFF
WASHINGTON, D. C. 20315

The copies of NOTES are being the
sent, not considered.

RECEIVED BY THE DIRECTOR, FBI, 11/11/54

and collect taxes to pay a judgment against it, it was insisted, "That the city owes a large amount of other debts, and that if these taxes are collected the other creditors will be entitled to share in the distribution of the proceeds. It is not competent for the respondents to make this objection. When any other creditor complains in a proper proceeding, and asks that the funds be marshaled, it will be time enough to consider the subject." *City of Galena v. Amy*, 5 Wall. 706, 18 L. Ed. 560.

Demurrer to answer to alternative writ.

916. (Mo. 1877.) If, from the answer to the alternative writ, it appears that the respondent is not in default, on demurrer to such answer, a peremptory writ will be denied. *United States v. Clark County*, 95 U. S. 769, 24 L. Ed. 545.

Writ directed to county board; service on clerk of board.

917. (Kan. 1878.) A writ of mandamus was awarded against a board of county commissioners in Kansas in its corporate name and capacity. Held, that it was properly directed. Held also, "When a copy of the writ which has been ordered is served upon the clerk of the board, it will be served on the corporation, and be equivalent to a command that the persons who may be members of the board shall do what is required. If the members fail to obey, those guilty of disobedience may, if necessary, be punished for the contempt." *Comrs. v. Sellew*, 99 U. S. 624, 25 L. Ed. 333.

Former mandamus against county officers to levy tax to pay judgment against township.

918. (Kan. 1883.) In this case the relator, having theretofore obtained a judgment against Salamanca township, Cherokee county, Kan., on bonds issued by the township, prayed for a writ of mandamus directing the county authorities to proceed to levy and collect a tax upon the taxable property of the township for the payment of his judgment,—it being made to appear that the office of president of the town-

ship was vacant when the judgment was rendered and had been ever since. Held, on consideration of the statutes of Kansas, that relator was entitled to the writ. *County Comrs. of Cherokee County v. Wilson*, 109 U. S. 621, 3 Sup. Ct. Rep. 352, 27 L. Ed. 1053,

Peremptory writ awarded.

919. (Neb. 1884.) In this case a peremptory writ was awarded directing the commissioners of Dodge county, Neb., to levy a tax on the taxable property of Fremont precinct sufficient to pay a judgment rendered upon bonds issued by the county commissioners on behalf of the precinct. The laws of Nebraska relating to such tax examined. *United States on the Relation of Chandler v. County Comrs. of Dodge County*, 110 U. S. 156, 2 Sup. Ct. Rep. 590, 28 L. Ed. 103.

Parties in mandamus proceedings.

920. (Kan. 1884.) In mandamus proceedings to enforce the payment of a judgment recovered by the relator against a township in Labette county, the writ was addressed to the board of county commissioners of Labette county, the clerk of said board, and the treasurer of the county. It was urged that the court had no jurisdiction of the board because they were not parties to the judgment against the township, and the proceedings against them would be the exercise of an original jurisdiction.

"The question is, whether the respondents, to whom the writ is addressed, have the legal duty to perform, which is required of them, and whether the relator has a legal right to its performance from them, by virtue of the judgment he has already obtained. If so, then they are, as here, the legal representatives of the defendant in that judgment, as being the parties on whom the law has cast the duty of providing for its satisfaction. They are not strangers to it, as being new parties, on whom an original obligation is sought to be charged, but are bound by it, as it stands, without the right to question it, and under a legal duty to take those steps which the law has prescribed as the only mode of providing means for its payment." Held, also, that the township

trustees were not necessary parties to the proceeding. Held, also, that the clerk of the county and the treasurer of the county were properly joined in the action.

"The relator is entitled to an effect-ive writ, and he can have it only on the terms of joining in its commands all those whose co-operation is by law required, even though it be by separate and successive steps, in the performance of those official duties, which is necessary to secure to him his legal right. Otherwise the whole proceeding is liable to be rendered nugatory and abortive." *Labette County Comrs. v. United States ex rel. Moulton*, 112 U. S. 217, 5 Sup. Ct. Rep. 108, 28 L. Ed. 698.

Rights of creditors not before the court not considered.

921. (La. 1891.) "But one point remains, and that is that relator, if entitled to the writ, is only entitled to it to pay the entire list of judgments recorded under the act of 1877, and that his judgment be paid only in order of recordation. To this it is only necessary to say, as the Supreme Court of the State have said in *State v. City of New Orleans*, 37 La. Ann. 18: 'We are not called upon to consider the rights of other judgment creditors whose judgments rank that of relator's in order of registry. The record does not advise us whether their judgments are based on contracts, or whether they rest upon causes of action arising prior to the constitutional amendment of 1874. It may be that none of them can compete with relators in the relief sought; but at all events, the unexhausted powers of taxation are ample to satisfy all; and if they are entitled to like rights with relators, and have neglected to exercise them, there is no reason why relator should suffer.'" *Mayor, etc., of the City of New Orleans v. United States ex rel. Stewart*, 1 C. C. A. 148, 49 Fed. 40.

Petition for mandamus must show the nature of the cause of action on which judgment based.

922. (Colo. 1895.) "The plaintiff's whole case, as disclosed by his petition,

consists in an allegation of the recovery of the judgment, and averment that it is the duty of the board of county commissioners to levy a tax to pay it, and a prayer that a peremptory writ of mandamus may issue commanding the board to make the levy. The nature of the cause of action or the kind of indebtedness upon which the judgment was recovered is not stated. The plaintiff does not rest his right to the writ upon the ground that the judgment was rendered upon the kind of indebtedness which the law makes it the duty of the board of county commissioners to levy a tax to pay."

"We recognize the well-settled rule that, where negotiable bonds or other like securities are issued by a county under authority of an act of the legislature which makes it obligatory upon the proper county authorities to levy a tax to pay them, the repeal of the act does not affect the power and duty of the county to levy the tax. In such cases the provision of the law making it obligatory upon the county authorities to levy a tax to pay the indebtedness enters into and becomes a part of the consideration of the contract and the legislature cannot repeal the law requiring the levy of the tax without impairing the obligation of the contract. *Meriweather v. Garrett*, supra; *United States v. Jefferson County*, 5 Dill. 310, Fed. Cas. No. 15,472. But no claim is made that the judgment in this case was rendered on any such cause of action. There is, indeed, nothing in the record showing that the plaintiff's judgment was rendered on any kind of a contract, or that the cause of action upon which it was rendered had any existence before the repeal of the act." *Board of County Comrs. of Grand County v. King*, 14 C. C. A. 421, 67 Fed. 202.

Practice; jury unnecessary, when.

923. (Tex. 1896.) "The material facts in the case were admitted in the pleadings, and the trial in the court below was practically upon the petition and answers. If no material fact was at issue, a jury was unnecessary." *Marion County et al. v. Coler et al.*, 21 C. C. A. 392, 75 Fed. 352.

Parties in mandamus proceedings; full relief.

924. (Tex. 1896.) "The defendants, J. C. Hart, tax collector, and J. E. Cooke, tax assessor, appeared in the court below, and filed a demurrer to the plaintiff's petition on the ground that the same did not show any legal duty resting on the defendants to do anything which they had failed to do, and did not show any demand on them to do anything which they refused to do." Held, "If the plaintiffs were entitled to a mandamus to compel the levy and collection of taxes, they were certainly entitled to one which would set all the machinery necessary for the levy, assessment, and collection of taxes in motion." *Marion County et al. v. Coler et al.*, 21 C. C. A. 392, 75 Fed. 352.

Demand for levy of tax, to what officers addressed.

925. (Ky. 1898.) The demand in this case was: "To the Fiscal Court of Muhlenberg county consisting of the judge of the Muhlenberg County Court, and the justices of the peace in and for said county, in Fiscal Court assembled, and to the judge of the Muhlenberg County Court."

It was contended that the demand should have been separately made on the County Court as composed of county judge and justices, and on the court as composed of the county judge alone.

"We think this demand was sufficient under the statute, and that it clearly informed the court, composed of the county judge and justices, as well as the court when presided over by the county judge alone, that the demand was made on both of them, and separately. It could not have been understood otherwise by a person of ordinary intelligence. The fact that the demand on the court when the county judge alone was presiding, as well as on the court when composed of the county judge and the justices, was contained in the same writing, is not material." *Fleming v. Trowsdale*, 29 C. C. A. 106, 85 Fed. 169.

Full relief against all officers.

926. (S. Car. 1901.) Following the decision in *Labette County Comrs. v. United States*, 112 U. S. 217, 5 Sup. Ct. Rep. 108, 28 L. Ed. 698, it was held that, in a mandamus proceeding to enforce the levy and collection of a tax to pay a judgment against a county, one writ of mandamus against all officers concerned in the separate but co-operative steps for levying and collecting a tax is the proper and effective remedy to enforce its collection. Held also, that the writ was properly directed not only to existing officers, but also to their successors. *Hicks, County Auditor, et al., v. Cleveland*, 106 Fed. 459.

Parties in mandamus.

927. (La. 1901.) In a mandamus proceeding in a Federal Court based upon a judgment rendered against the city of New Orleans, in the same court, to compel the board of liquidation of the city to pay or fund the judgment as provided by law, the court has jurisdiction notwithstanding such board was not a party to the original suit, as it was charged with the duty of liquidating the judgment. *Board of Liquidation v. United States*, 108 Fed. 689, 47 C. C. A. 587.

Officers required to perform successive acts in the levy and collection of taxes properly joined as defendants in mandamus.

928. (Ky. 1904.) In mandamus, to enforce the levy and collection of a tax to pay a judgment rendered against a county on its bonds, there were joined as defendants the county judge, whose duty it was to levy the taxes and the sheriff who was charged by law with giving a bond and collecting the taxes, it was contended that as to the sheriff the action was premature.

Held: "But it was distinctly decided otherwise by the Supreme Court in *Labette County v. Moulton*, 112 U. S. 217, 5 Sup. Ct. 108, 28 L. Ed. 698, where it was held proper to join

in the writ those officers who were charged by law with the performance of successive duties required in the levying and collection of the tax. As soon as the levy has been made and tendered to him for collection, the sheriff's duty at once becomes impera-

tive to proceed to give the bond, to qualify himself, and to collect the tax. That was a duty he took upon himself when he assumed his office." *Guthrie v. Sparks*, 65 C. C. A. 427, 131 Fed. 443.

CHAPTER XIII.

DEFENSES TO MUNICIPAL BONDS.

The subject of defenses to municipal bonds includes the whole body of the law relating to such securities. When municipal bonds are issued in pursuance of legal authority, for an authorized public purpose, and all legal requirements and conditions exist or have been performed and complied with, no defense to their enforcement can be successfully maintained against any owner of them.

Absence of legal authority for the issuance of such obligations at the time of their issuance is always available, as a defense, except in case of legislative ratification; but there can be no such ratification if any constitutional provision would be thereby violated.

Fraud or other official misconduct or delinquency in the issuance of the bonds, under an existing legal authority, or an excessive issue, or misapplication of the bonds, or of their proceeds to an illegal or unauthorized purpose, or improper execution of the bonds, or other irregularities or omissions in the statutory requirements, may or may not be available as defenses, depending upon the facts and circumstances of the cases as they arise, and the application of the principles and rules of law discussed in, and illustrated by, the cases found and cited in the several chapters of this work.

Special consideration should be given in such cases to the rules of law relating to the rights of bona fide holders of the securities, and to the effect of recitals, or other matters contained in the bonds, affirming their legality, or disclosing, or putting a purchaser upon inquiry concerning, some illegality.

As the subject of defenses in such cases, as before suggested, includes almost all branches of the law of municipal bonds, we shall forego any further discussion here of the rules of law relating to such defenses; and, to avoid the necessity of here repeating and recopying the cases bearing on this branch of the subject, all of which have been appropriately placed in other chapters,

such cases are here cited by carefully arranged cross-references following these suggestions.

Any one approaching the subject with some idea of a defense or defenses, though possibly not clearly defined, will readily find, in such cross-references, and in the index and table of contents, references to the appropriate authorities.

CROSS-REFERENCES.

1. Defenses based upon absence of authority to issue bonds.—Chapter IV, Part A.
2. Authority to issue bonds, when may not be implied.—Chapter IV, Part B.
3. Absence of authority may, in some cases, be cured by ratification by act of legislature.—Chapter VIII, Part B.
4. Corporations illegally or irregularly organized; officers illegally or irregularly elected; defenses based upon.—Chapter IV, Part D.
5. Defenses based upon irregular or wrongful exercise of existing legal authority.—Chapter IV, Part C.
6. How affected by subsequent ratifying acts of officers or legislature.—Chapter VIII, Parts A and B.
7. Defenses based upon improper execution of bonds or unauthorized delivery.—Chapter VI.
8. Defenses based upon failure to comply with the law in enacting and publishing ordinances, resolutions, etc.—Chapter V, Parts A and B.
9. Records of proceedings and other public records; defenses based upon absence of, or defects in, or illegalities or irregularities disclosed by.—Chapter V, Parts B and C.
10. Unauthorized or prohibited purpose, defenses to bonds issued for.—Chapter III, Part B.; Chapter IV, Part C.
11. Repeals of or changes in enabling statutes and charter powers; dissolution, consolidation, etc., rights how affected.—Chapter X; Chapter XI, Part B; Chapter XII, Part C.
12. Constitutional grounds; defenses based upon.—Chapter XI.
13. Limitation of actions, defenses based upon.—Chapter XII, Part A.
14. Defenses, when not available against bona fide holders.—Chapter VII, Part D.
15. When defenses are available against bona fide holders.—Chapter VII, Part E.
16. *Res adjudicata* and *lis pendens*; defenses based upon.—Chapter XVII; Chapter XII, Part C.
17. Taxes and assessments; defenses based upon absence of, or limitations upon, authority to levy and collect and irregularities in making levies.—Chapter IX; Chapter XII, Part C.
18. Action for money had and received will sometimes lie when bonds are invalid.—For defenses to such action, see Chapter XII, Part A.
19. Actions by bondholders for equitable relief, defenses to.—Chapter XII, Part C.
20. *Mandamus* proceedings, defenses to.—Chapter XII, Part C.
21. Decisions of State courts, defenses based upon, in suits in Federal Courts.—Chapter XVI, Part B.

CHAPTER XIV.

TAXPAYERS' REMEDIES FOR THE PREVENTION OF THE WRONGFUL ISSUANCE OF MUNICIPAL BONDS.

In a large number of the cases in which the collection of negotiable municipal bonds has been contested, it has been urged that, by the enforcement of the obligations, a fraud or wrong would have been perpetrated upon the taxpayers, that the securities were issued by the officers of the body in violation of law.

It is however true that in many of such cases the alleged fraud or wrong has been committed with the acquiescence of all, or a considerable number of such taxpayers, and in some cases at their express request, or with their unqualified assent. It is a well-known fact that the people of a community will often more generally and more enthusiastically support by their votes and influence the raising of large amounts of money by the issuing of bonds for an unauthorized, or even an expressly inhibited purpose, than for legal and public purposes. The issuance of bonds to aid in the promotion of railroads, when not authorized, or of manufacturing establishments, or other private enterprises that it may be thought will largely contribute to the convenience, growth, business, and wealth of the community, are forceful illustrations.

The illegal purpose is frequently accomplished by issuing bonds ostensibly for a legal purpose, and by expending the proceeds, when received, for the intended illegal purpose. There have also been instances in which the officers of the municipality—the legally authorized agents of the taxpayers—have been induced to so illegally issue bonds without the general co-operation of the people, but the instances are rare in which in such cases the officers have not been encouraged so to act by the co-operation of a portion of the voters or taxpayers.

All of these alleged frauds or wrongs could have been avoided, prohibited, by the timely application of a dissenting taxpayer to the courts for an order enjoining the commission of the act.

Such preventive remedies are provided for in every commonwealth in the country, and the courts are always prompt and vigorous in action to afford the proper relief and prevent the intended wrong, when appealed to for that purpose.

The issuance of bonds for a legal purpose will also be restrained by the courts when the requirements of the law are not being substantially complied with in proceedings preliminary to, and in their issuance, or when the amount of the proposed issue is beyond what the statutes or the Constitution permit. Persons who are interested as taxpayers, and who would be prejudiced by any such improper issuance of negotiable bonds by the corporate officers, their agents, who fail to protect their rights and interests in the way suggested, have little cause to complain of the rule that protects the bona fide holder of bonds so issued, and compels them, the taxpayers, to contribute to their payment.

But few of such cases have been prosecuted in the Federal courts, as in most instances those courts are without jurisdiction, on account of the citizenship of the parties.

Taxpayers may prevent wrongful issue of bonds.

929. (Mo. 1877.) A county was held to be estopped by acts of the county officials in the issuance of bonds under the circumstances stated.

"Upon the clearest principles of justice, the taxpayers of Ray county are concluded by the acts of their official agents, and by their own failure, either intentionally or from neglect, to assert, by appropriate proceedings, their legal right, (if any they ever had) to prevent the transfer of their original subscription to the company, which, by the construction of its road, gave them greater railroad facilities, and at no greater cost, than they could have obtained under the contract with the North Missouri Railroad Company." *County of Ray v. Vansycle*, 96 U. S. 675, 24 L. Ed. 800.

Remedy of municipality for irregular and fraudulent conduct of its officers in delivery of bonds to railroad company in violation of conditions.

930. (Ill. 1878.) When bonds have been issued on behalf of a town by the proper officers thereof, without compliance with conditions imposed by the voters, and have been delivered to the railroad company in violation of

special conditions of which the purchasers had no knowledge or notice, either from the statute or otherwise, the remedy of the town is against the railroad and its own unfaithful officers, who, it was alleged, were in fraudulent combination with the company. *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416.

Action by taxpayers to compel return of real estate paid for by issue of unauthorized bonds and to prevent payment of bonds.

931. (N. J. 1879.) An action was prosecuted in a Circuit Court of the United States against a county, upon bonds issued by the county board without authority of law. The suit was brought by taxpayers of the county to compel the return of the bonds and to enjoin the prosecution of an action to enforce their payment.

"Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State courts in numerous cases; and from the nature

of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property-holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases. Those who desire to consult the leading authorities on this subject will find them stated or referred to in Mr. Dillon's excellent treatise on the Law of Municipal Corporations." *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070.

Failure to enjoin issue of bonds for irregularity.

932. (Kan. 1885.) "It is further to be said, that if there was, in fact, any want of proper notice of the election, the omission was only an irregularity in the exercise of an express power to issue the bonds, an irregularity in respect to a step forming part of preliminary conditions, and that the failure of the municipality and of the taxpayers to enjoin the issue or use of the bonds during the long period from the day of the election, September 13, 1869, until the bonds were registered in March, 1872, when they still belonged to and were in the hands of the company, coupled with the annual payment by the county, for ten years, of the interest on the bonds, are sufficient grounds for holding that the municipality is estopped from defending on the ground of such non-compliance with a condition precedent as is set up in this case, after the bonds have been negotiated for value by the company." *Anderson County Comrs. v. Beal*, 113 U. S. 227, 5 Sup. Ct. Rep. 433, 28 L. Ed. 966.

CHAPTER XV.

PARTIES, PLEADING, PRACTICE AND EVIDENCE IN MUNICIPAL BOND CASES.

A. Parties, pleading, and practice in municipal bond cases.

B. Evidence in municipal bond cases.

The rules of pleading, practice, and evidence in municipal bond cases are not so peculiar or distinctive as to require special consideration. The treatment of these subjects is not within the scope of this work, but we have thought it not improper to cite in this chapter the cases involving municipal bonds in which questions of pleading, practice, and evidence have been considered by the Supreme Court and the Circuit Courts of Appeals.

In civil actions at law, the Circuit Courts of the United States follow the forms and rules of practice prevailing in the courts of the respective States, except in such matters as are provided for by Congress.

The Revised Statutes of the United States provide (§ 914) that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms, and the modes of proceeding existing at the time in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

A. Parties, Pleading, and Practice in Municipal Bond Cases.

Bill of exceptions unnecessary.

933. (Wis. 1865.) "It is well settled that the ruling of the Circuit Court in sustaining or overruling a demurrer to a declaration and rendering judgment for the wrong party may be re-examined in this court by a writ of error without any formal bill of exceptions. Reason for the rule is, that the error is apparent on the record; and it is generally true that where the error is apparent on the face of the record a bill of exceptions is unnecessary." *Rogers v. Burlington*, 3 Wall.

654, 18 L. Ed. 79. Affirmed in *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350.

Pleading in suit on interest coupons.

934. (Wis. 1869.) "Recurring again to the declaration, we have said that the preamble, or inducement, was unnecessary, and might well be rejected as surplusage. As we have seen, it recites, in very general terms, the bonds to which the several coupons in suit were annexed. Now, each coupon itself contains substantially on its face,

all this information. It is issued for interest due at a certain day and place on a bond, giving its number and date. Another form adds the amount, but this is unimportant as the bond is sufficiently identified without it. The production of the coupon, therefore, at the trial, will show the relation it bears to the bond, and, if our opinion is sound, that in this connection it cannot be legally severed from it till the interest is paid, a count upon the coupon is all that can be material." *The City (of Kenosha) v. Lamson*, 9 Wall. 477, 19 L. Ed. 725-730.

General denial in answer to petition.

935. (Iowa, 1870.) "The denials of the first part of the answer, though not strictly in the form required by the rule, put in issue every material fact alleged in the petition. It therefore made an issue on the plaintiff's allegation that he became the holder of said coupons before maturity, and that he paid value therefor, so far as that might become material to be shown on the trial." *Smith v. Sac County*, 11 Wall. 139, 20 L. Ed. 102.

936. (Wis. 1872.) A judgment will not be reversed by a reviewing court for technical errors of the trial court when they were not prejudicial to the party complaining. *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170.

Trial court directing verdict.

937. (Kan. 1876.) "Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence." *Comrs. of Marion County v. Clark*, 94 U. S. 278, 24 L. Ed. 59.

Copy of bonds in declaration; irregularity in issue shown thereby; demurrer that declaration does not set forth good cause of action: sustained.

938. (Kan. 1876.) "As the declaration sets out a copy of the bonds with all the recitals, and the recitals show that the bonds were irregularly issued and not binding upon the township, it follows that the declaration does not set forth a good cause of action against the defendant, and that the demurrer

was properly sustained." *McClure v. Township of Oxford*, 94 U. S. 429, 24 L. Ed. 129.

Demurrer to answer to petition on bonds.

939. (Mo. 1876.) Plaintiff alleged in his complaint that the defendant county issued certain bonds, which recited that they were issued pursuant to an order of the County Court made on a date named by authority of an act mentioned, that he was the owner for value of coupons of said bonds and entitled to recover thereon. The county answered, besides denying its promise to pay the bonds or coupons and that plaintiff was the owner for value of the coupons, that no orders for their issuance were made by the County Court, but that two of the justices of the court fraudulently and corruptly, but not as a court, made certain orders set forth, but upon conditions which were not complied with. On a general demurrer to this answer, held that, if the answer contained any good defense, the demurrer must be overruled.

"We think the plaintiff erred in demurring to the answer and thus admitting that the County Court had never exercised its power." Held, also, "The plaintiff's case is not aided by the allegation that he is a holder for value of the coupons. A holder for value is not affected by any irregularities or frauds or unfounded assumption of authority on the part of the agents of the town or county. But good faith is unavailing where there is an entire want of authority in those who profess to act."

"The answer expressly denies that the plaintiff is a holder for value of the coupons." *County of Dallas v. McKenzie*, 94 U. S. 660, 24 L. Ed. 182.

Judgment against county on bonds of township.

940. (Mo. 1877.) Held, that suit was properly brought against the county on bonds issued by the County Court on behalf of a township of the county. *County of Cass v. Johnson*, 95 U. S. 360, 24 L. Ed. 419.

Filing instruments sued on with declaration.

941. (Ill. 1878.) By the statute of Illinois in regard to practice in courts of record * * * the plaintiff in a suit upon a written instrument is re-

quired to file with his declaration a copy of the instrument sued upon. In obedience to this statute the plaintiff in this case filed with his declaration copies of the bonds and coupons declared upon. In this way we think the bonds became a part of the pleadings in the case.

Demurrer to plea, when sustained.

"The bonds upon their face refer to the ordinance of the city council authorizing their issue, printed on the back; and in the ordinance it is distinctly recited that the election required by law was held pursuant to notice given in accordance with the provisions of the act authorizing a subscription, and that upon a canvass of the votes 'it appeared that there had been cast for subscription a large majority of the votes of said city, the number of votes given being a large majority of all the votes polled at the last general election in said city, and a much larger vote than that required by the act aforesaid to authorize said subscription.' With this recital, in effect, upon the face of the bonds in the hands of an innocent holder, it was certainly not error in the court below to sustain a demurrer to the second, third, fourth, and fifth pleas, which simply tendered an issue as to the authority of the city to issue the bonds, and as to the fact of the election." *Nauvoo v. Ritter*, 97 U. S. 389, 24 L. Ed. 1050.

Charge to the jury.

942. (N. Y. 1878.) "Where the testimony is all one way and is conclusive in its effect, a party has no right to ask a charge which assumes that it is otherwise. It would tend to create a doubt where none existed, or ought to exist, and might mislead the jury."

Directing verdict.

"The last assignment complains that the court directed the jury to find for the plaintiff. It is well settled in the jurisprudence of this court, that if the facts are clearly established and are undisputed, it is competent for the court to give such a charge. In one of the cases brought before us, where it had been done, the practice was commended, and it was remarked that 'it gives the certainty of applied science to the results of judicial investigation.' *Merchants' Bank v. The State*

Bank, 10 Wall. 604." *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404.

Pleading; sufficiency of petition on bonds; pleading precedent conditions.

943. (Mich. 1880.) Held, that in an action on bonds of a municipal body issued in pursuance of legal authority it was unnecessary to plead the performance by the municipality of precedent conditions, such as a popular vote, etc.

"The township had authority by law to issue its bonds by way of donation to a railroad. It did issue its bonds. They got into circulation as commercial securities, and were purchased by the plaintiff. All the plaintiff had to do in case of nonpayment was simply to sue on the bonds. If there was any defense to them by reason of want of performance of any of the requisites necessary to give them validity, or for any other cause, it was for the defendant to show it. A bond, especially a negotiable bond, is a prima facie obligation of the obligor, if he has capacity to make it; and is binding according to the terms and conditions apparent on its face until the contrary be shown. Whether an alleged defense, when set up, is or is not good against the particular holder, it is to be determined by the court in each case. How far, as against a bona fide holder, the obligor may, in any case, go behind the obligation itself, for the purpose of showing a failure to pursue the law authorizing its issue, is not yet, perhaps, clearly determined." *Lincoln v. Iron Co.*, 103 U. S. 412, 28 L. Ed. 518.

Review of finding of facts.

944. (Ill. 1880.) "One thing is clear, that there can be no review in this court of the finding of fact made in the court below. Section 649 of the Revised Statutes declares: 'The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.'" *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526.

The office of a bill of exceptions.

945. (Ill. 1880.) "The office of a bill of exceptions, where the facts are tried by the court, is pointed out by section 700, Revised Statutes: 'The rulings of the court in the progress of the trial of the cause, if excepted to

at the time and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal, and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

"It is thus seen that the only use which can be made of the bill of exceptions, when there is a special finding of facts, is to present the rulings of the court in the progress of the trial upon questions of law." *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526.

Directing verdict.

946. (N. Y. 1881.) "If the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence was not sufficient to warrant a particular verdict, the jury might be so instructed." *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866.

Allegations as to bona fides of holder in action on bonds.

947. (Mo. 1881.) In a suit on county bonds or coupons when there is no plea or answer denying their execution, it is not necessary to prove the order of the County Court authorizing the president of the court to sign them.

Directing verdict.

"Since all the defenses relied on involved questions of law only, except that as to bona fide ownership, and the court correctly decided the legal propositions in favor of the plaintiff, it was not error to instruct the jury to bring in a verdict for the plaintiff if they believed he was a bona fide holder and owner of the coupons sued for." *County of Rall v. Douglass*, 105 U. S. 728, 26 L. Ed. 975.

Bonds transferred to plaintiff for collection only.

948. (N. J. 1883.) Plaintiffs prosecuted a suit in equity for the reformation of bonds issued by the defendant township, to which no seal had been affixed, including in the suit bonds belonging to other persons who could not have invoked the jurisdiction of the Federal court, and which had been assigned to plaintiff for the purpose of collection, with bonds owned by him in the Federal court for the

benefit of such owners. Discussing the question of jurisdiction, the court say:

"The remaining question argued at the bar is how far the citizenship of the real parties in interest, and the amount of the claim of each, should affect the exercise of jurisdiction and the extent of the decree.

"The position of the plaintiffs is, that the bonds and coupons being payable to bearer, they are entitled to sue, at law or in equity, on all the coupons held by them; that the combination of the holders of several claims of moderate amount against the same defendant, for the purpose of diminishing and sharing the expense of litigation, was entirely proper, and should be encouraged by the court; that the bonds and coupons owned as well as held by the plaintiffs, and by others not citizens of New Jersey, clearly brought the case within the jurisdiction of the court; and that to deny to citizens of New Jersey the right to transfer their claims to the plaintiffs for the purpose of collection in the same suit would be to discriminate unjustly between the citizens of New Jersey and the citizens of other States."

"It follows, that these bills should have been dismissed so far as regarded the bond for \$200, owned by a citizen of New York in the first case, and also as to all the bonds owned by citizens of New Jersey in either case. But no valid objection has been shown to the maintenance of these bills, so far as regards those bonds of which the plaintiffs are the bearers, and which are actually owned, either by themselves or by other citizens of New York or Pennsylvania, to a sufficient amount by each owner to sustain the jurisdiction of the Circuit Court. *Thompson v. Perrine*, 106 U. S. 589; *Chickaming v. Carpenter*, 106 U. S. 663; *Douglass County Comrs. v. Bolles*, 94 U. S. 104, 109; *Cromwell v. Sac. County*, 94 U. S. 351, 360. The decrees of the Circuit Court must be modified accordingly." *Bernards Township v. Stebbins*; *Same v. Morrison*, 109 U. S. 341, 3 Sup. Ct. Rep. 252, 27 L. Ed. 956.

To same effect: *New Providence v. Halsey*, 117 U. S. 336, 6 Sup. Ct. Rep. 764, 29 L. Ed. 904.

949. (Nebr. 1884.) An action is properly brought against a county in Ne-

braska to collect railroad bonds issued by the county board on behalf of a precinct of such county. *Blair v. Cumming County*, 111 U. S. 363, 4 Sup. Ct. Rep. 449, 28 L. Ed. 457.

Directing verdict on insufficient evidence.

950. (Kan. 1885.) "In *Pleasants v. Fant*, 22 Wall. 116, 120, this court said, by Mr. Justice Miller, citing *Improvement Co. v. Munson*, 14 Wall. 442, 448, that 'in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' Those cases were cited in *Herbert v. Butler*, 97 U. S. 319, 320, and this court there said, by Mr. Justice Bradley: 'Although there may be some evidence in favor of a party, yet if it is insufficient to sustain a verdict, so that one based thereon would be set aside, the court is not bound to submit the case to the jury, but may direct them what verdict to render.' It is true that, in the above cases, the verdict was directed for the defendant. But where the question, after all the evidence is in, is one entirely of law, a verdict may, at the trial, be directed for the plaintiff, and, where the bill of exceptions, as here, sets forth all the evidence in the case, this court, if concurring with the court below in its views on the questions of law presented by the bill of exceptions and the record, will affirm the judgment." *Anderson County Comrs. v. Beal*, 113 U. S. 227, 5 Sup. Ct. Rep. 433, 28 L. Ed. 966.

Review on error by supreme court.

951. (Ill. 1881.) "There is no special finding of facts; and the general finding of the issues for the plaintiff is not open to review by this court. *Martinton v. Fairbanks*, 112 U. S. 670. The question discussed by counsel for the defendant as to the legal authority of the town to issue the bonds referred to fairly arise upon the first count of the declaration. But their determination cannot affect the judgment, for the common counts are sufficient under the statutes of Illinois to support the judgment; without reference to any question of the legal authority to issue

the bonds described in the first count." *Santa Anna v. Frank*, 113 U. S. 339, 5 Sup. Ct. Rep. 536, 28 L. Ed. 978.

Rights of holder for collection merely.

952. (N. J. 1886.) *Bernards Township v. Stebbins*, 109 U. S. 341, followed in this case as to the right of a holder for collection only of bonds to sue thereon in the Federal court when the transferor and real owner could not.

Owner may sue in federal court, whether transferor could or not.

Ackley School District v. Hall, 113 U. S. 135, followed on the point that a municipal bond in the ordinary form is, "A promissory note negotiable by the law merchant, within the meaning of that term in the act of March 3, 1875, 18 Stat. 470, chap. 137, § 1, which allows a suit on instruments of that class to be brought in the courts of the United States by an assignee, notwithstanding a suit could not have been prosecuted in such court if no assignment had been made." *New Providence v. Halsey*, 117 U. S. 336, 6 Sup. Ct. Rep. 764, 29 L. Ed. 904.

Allegation and proof of authority to issue bonds, when necessary.

953. (Ind. 1886.) The statutes of Indiana conferred power on incorporated towns to issue bonds for municipal purposes only.

"The bonds in suit containing no statement of the purpose for which they were issued, and no recital which can bind the town by way of estoppel, any one suing upon the bonds is bound to allege and prove the authority of the town to issue them." *Gelpcke v. Dubuque*, 1 Wall. 175, 203, and other cases distinguished.

Demurrer admits only facts well pleaded.

"A demurrer admits only facts, and facts well pleaded. The town having but a limited authority to issue bonds for certain purposes, it is not enough for the plaintiff to aver in general terms that the town was authorized to issue the bonds in suit; but he must state the facts which bring the case within the special authority." *Hopper v. Covington*, 118 U. S. 148, 6 Sup. Ct. Rep. 1025, 30 L. Ed. 190.

Suit against county in Nebraska on precinct bonds.

954. (Nebr. 1887.) It was urged that, as the bonds in suit were precinct bonds, though issued by the county commissioners, no action could be maintained on them against the county. Held, that the action was properly brought against the county.

"This question has been set at rest by the previous decisions of this court. *Davenport v. Dodge County*, 105 U. S. 237, and *Blair v. Cuming County*, 111 U. S. 363, are decisions upon the very point arising under the same statute." *Nemaha County v. Frank*, 120 U. S. 41, 7 Sup. Ct. Rep. 395, 30 L. Ed. 584.

Demurrer to pleading admits only matters of fact well pleaded.

955. (Ark. 1893.) "It is urged by the plaintiff in error that this action of the lower court was erroneous, for the reason that the answer set forth sufficient facts to invalidate the bonds within the rule laid down in *Dixon County v. Field*, 111 U. S. 83, 92, 93. We do not take this view of the answer. It abounds in recitals of statements of what papers made exhibits thereto purport to show, and in conclusions of law, which are not admitted by the demurrer, the rule being well settled that only matters of fact well pleaded are admitted by a demurrer, while conclusions of law are not. *United States v. Ames*, 99 U. S. 35, 45; *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U. S. 569, 578. The answer was of such a character as to present no issuable questions of fact going to the merits of the suit, and was properly demurred to, and there was no error in sustaining the demurrer." *Chicot County v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. Rep. 695, 37 L. Ed. 546.

Scope of inquiry on appeal to supreme court of United States.

956. (Cal. 1896.) This case came before the Supreme Court by appeal from a decree of the United States Circuit Court for the Southern District of California.

"Coming before the court in this way, we are not confined in our review of the decision of the lower court within the same limits that we would be if the case were here on error from the judgment of a State court." *Fallbrook Irrigation District v. Bradley*,

164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369.

Note. For a full digest of this case, see chapter 11, part C.

Unnecessary to plead facts preliminary to exercise of power.

957. (Ky. 1894.) "The allegation of the petition is that the election required 'was duly held.' This is substantially an averment that the election was held according to the requirements of the law. It was not, however, important that the pleader should aver the preliminary facts requisite to the exercise of the power granted by the legislature to subscribe for the stock and issue bonds in payment. The power to hold an election, subscribe for stock, and issue the bonds is averred. If there was any defect in the steps preliminary to the exercise of that power, it is for the defendant to plead and show such irregularity. The performance or nonperformance of acts requisite to the valid exercise of the power are matters of defense." *Breckinridge County v. McCracken et al.*, 9 C. C. A. 442, 61 Fed. 191.

Demurrer to petition waived by answering to merits and proceeding to trial.

958. (Kan. 1894.) A demurrer filed by a defendant to a petition will be waived by subsequently answering to the merits.

"Where it is apparent that the transaction out of which a cause of action is supposed to have originated could not give rise to a meritorious cause of action, the rule is, of course, different; but a mere incompleteness or uncertainty of averment — a failure to state some fact which should have been stated, to make a technically good declaration or complaint — will be of no avail in this court when it appears that after a demurrer was overruled the party answered to the merits and went to trial on issues raised by his answer." *Board of Comrs. of Hamilton County v. Sherwood*, C. C. A. , 64 Fed. 103.

Jury waived; general finding for plaintiff; error in refusal of instructions.

959. (Kan. 1895.) "The case was tried before the court on a written stipulation waiving a jury, and the finding by the Circuit Court in favor

of the plaintiff was general, and not special. For this reason no errors assigned relative to the giving or refusal of instructions, which were asked with a view of controlling the general finding, are before us for review." Board of Comrs. of Kearney County v. McMaster, 15 C. C. A. 353, 38 Fed. 177.

Scope of inquiry on error by reviewing court.

960. (Kan. 1895.) "The case having been tried by the Circuit Court without the intervention of a jury, its findings on the issues raised by the pleadings having been general, and no instruction having been asked in the nature of a demurrer to the evidence, we are limited in our consideration of the case to such errors as have been assigned relative to the admission or exclusion of testimony. No other errors that may have been committed by the trial court in the progress of the case are before us for review." Hinckley v. City of Arkansas City, 16 C. C. A. 395, 69 Fed. 768.

Special finding of facts; what sufficient.

961. (Kan. 1895.) "As we have before indicated, there is no special finding of fact contained in the record which we can notice, and it goes without saying that this court is without power to examine the testimony for the purpose of making a finding, either general or special. It is true that the record contains an opinion of the trial judge, delivered contemporaneously with the rendition of the judgment, in which he said, among other things, while discussing the case:

"Plaintiffs purchased these bonds from Spitzer & Company who were innocent holders, and all their rights passed to plaintiffs. Porter v. Steel Co., 122 U. S. 267, 7 Sup. Ct. Rep. 1206; Scotland County v. Hill, 132 U. S. 107, 10 Sup. Ct. Rep. 26. Plaintiffs are, therefore, entitled to all the protection which the law gives to holders of this class of securities who purchased them without notice and for value."

"But this is not a special finding of fact which we can accept and be governed by, nor was it intended as such by the trial judge. In legal contemplation, a special finding of fact, as distinguished from a general finding, is one in which the trial judge states

succinctly his ultimate conclusion on each material issue of fact raised by the pleadings. It is like a special verdict, or an agreed statement of facts. It must not be a mere recital of the testimony on which the ultimate finding is to be based, nor leave a part of the material issues of fact raised by the pleadings undecided. Moreover, a special finding of fact should be so framed as to indicate clearly that the trial court intended it not merely as an opinion containing a decision upon questions of law and fact, but as a special finding embodying his ultimate conclusions on mooted questions of fact only." A number of authorities cited. Hinckley v. City of Arkansas City, 16 C. C. A. 395, 69 Fed. 768.

Pleading precedent conditions unnecessary.

962. (Colo. 1896.) "If the contract, as it is set out in the complaint, was within the scope of the powers of the city, and was made by it, as the complaint alleges, then that contract cannot be avoided by the existence or nonexistence of some prerequisite concerning which the complaint is silent. The plaintiff has averred that a contract was made which the city had the power to make. It has pleaded a valid contract. If a previous appropriation was requisite to its validity, the presumption arises, from the execution of the contract, that this appropriation was made. If it was not made, that fact is new matter, which can be brought to the attention of the court by plea or answer only."

Presumption of performance of precedent conditions.

"A contract of a corporation, fully executed by its proper officers, by authority of its governing board, and not in itself necessarily beyond the scope of its powers, will, in the absence of pleading and proof to the contrary, be presumed to have been made by lawful authority. Acts done by the corporation which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter. City of Lincoln v. Sun Vapor Street-Light Co., 19 U. S. App. 431, 8 C. C. A. 253, 59 Fed. 756, 760; Lincoln v. Iron Co., 103 U. S. 412, 416; Bank v. Dandridge, 12 Wheat. 64, 70; Omaha Bridge Cases, 10 U. S. App. 98, 189, 2 C. C. A. 174, 240, 51 Fed. 309, and cases cited:

Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620, 629." *Barber Asphalt Paving Co. v. City of Denver*, 19 C. C. A. 139, 72 Fed. 336.

Special finding of facts.

963. (Ill. 1896.) A special finding of facts like a general finding or verdict, is in itself a part of the record, and should not be embodied in a bill of exceptions.

The finding "should be complete in itself, unaided by references to bills of exceptions, though documents set out in the pleadings, or otherwise in the record, may be referred to without recopying." *Wesson v. Saline County; Society for Savings v. Same*, 20 C. C. A. 227, 73 Fed. 917.

Objections to irregularities in proceedings first made in appellate court.

964. (Tex. 1897.) An objection was made for the first time after the case had been appealed that a demurrer filed to the bill in the Circuit Court did not comply with equity rule 31, requiring a certificate of council and affidavit of the defendant. Held, "When a demurrer is irregularly filed, it may be wholly disregarded, or taken from the files, upon motion of the plaintiff." *Ewing v. Blight*, 3 Wall. Jr. 134, Fed. Cas. No. 4,589; *Taylor v. Brown*, supra; *Keen v. Jordan*, 13 Fla. 327; 1 Beach Mod. Eq. Prac. 323. In this case the appellee neither disregarded the demurrer, nor moved to strike it from the files. On the contrary, the demurrer came on for hearing, was argued by counsel, and, as shown by the decree, overruled by the court. Objection is here made—for the first time, so far as the record discloses—to the irregularities complained of. That the appellee is too late in urging its objection seems to be well settled." *Brazoria County v. Youngstown Bridge Co.*, 25 C. C. A. 306, 80 Fed. 10.

Bill of exceptions, sufficiency of.

965. (Colo. 1897.) "Inasmuch as the bill of exceptions fails to show that it contains all the evidence which was produced at the trial of the case, the point is well made, in behalf of the defendant, that the action of the lower court in directing a verdict for the defendant cannot be reviewed. Nor can any of the exceptions which were taken to the charge be reviewed, for, while the charge was somewhat

lengthy, yet, as it concluded with a peremptory direction to the jury to return a verdict for the defendant, it must be treated by this court precisely as it would have been had the trial court, without any explanation of its views, simply directed a finding for the defendant. When a peremptory instruction is given, either in favor of the plaintiff or the defendant, the only question with respect to the charge which is open for consideration by an appellate tribunal is whether the direction to find for the one party or the other, when considered in the light of the pleadings and all the evidence, was right; and, if the bill of exceptions fails to disclose that it contains all the evidence, that question, for obvious reasons, cannot be noticed."

E. H. Rollins & Sons v. Board of Comrs. of Gunnison County, Colo., 26 C. C. A. 91, 80 Fed. 692.

Finding of facts by trial court.

966. (Minn. 1898.) Finding of facts by the trial judge are not open to dispute in this court, but must be accepted as conclusive. *City of South St. Paul v. Lamprecht Bros. Co.*, 31 C. C. A. 585, 88 Fed. 449.

Withdrawal of case from jury, when justified; objection offered on appeal not presented on trial below.

967. (Kan. 1898.) "It is only when the evidence is free from conflict or so clear and convincing that all reasonable men who exercise an honest judgment upon it are compelled to reach the same conclusion, that the court is justified in withdrawing the question from the jury."

"A defendant cannot be permitted to present for the first time in an appellate court an objection to the plaintiff's recovery so easily removed, which he passed in silence at the trial." *Speer v. Board of County Comrs. of Kearney County, Kan.*, 32 C. C. A. 101, 88 Fed. 749.

Review on error.

968. (Nebr. 1899.) "When a case is tried by a Federal court without a jury, and the resulting judgment is brought by a writ of error to an appellate court for review, it is only 'the rulings of the court in the progress of the trial of the case,' and the sufficiency of the facts found to support the judgment, that can be reviewed. Rev. Stat., § 700. In such

a case this is a court for the correction of the errors of the court below only." *Grattan Township v. Chilton*, 38 C. C. A. 84, 97 Fed. 145.

What questions will be considered on error by a reviewing court.

969. (Colo. 1899.) "In an action at law, this is a court for the correction of the errors of the court below exclusively. Questions which were not presented to, or decided by, that court are not open for review here, because the trial court cannot be guilty of error in a ruling that it has never made upon an issue to which its attention was never called. *Railway Co. v. Henson*, 19 U. S. App. 169, 171, 7 C. C. A. 349, 351, and 58 Fed. 530, 532; *Philip Schneider Brewing Co. v. American Ice Mach. Co.*, 40 U. S. App. 382, 403, 23 C. C. A. 89, 100, and 77 Fed. 138, 149; *Manufacturing Co. v. Joyce*, 8 U. S. App. 309, 311, 4 C. C. A. 368, 370, and 54 Fed. 332, 333. If it should be thought that the exception to the peremptory charge of the court to return a verdict for the defendant and the assignment of error upon that ruling presented this question, attention is called to the fact that this exception and assignment present nothing for review in this case, because the bill of exceptions contains only fragmentary portions of the evidence. It is impossible for an appellate court to determine whether or not the court below came to the true conclusion when it directed a verdict upon the evidence in the case, unless all the evidence before that court is presented to the reviewing court for its consideration. *Taylor-Craig Corp. v. Hage*, 32 U. S. App. 548, 552, 16 C. C. A. 339, 340, and 69 Fed. 581, 583. The complaint of the ruling of the court below upon the question of res adjudicata cannot be sustained." *Board of Comrs. of Lake County, Colo., v. Sutliff*, 38 C. C. A. 167, 97 Fed. 270.

Transfer of bonds and coupons for purpose of suit; right of transferee to sue in his own name; defenses admissible against him.

970. (Ohio, 1900.) "Upon the question of the right of the plaintiff to bring the action we think there is no difficulty. Doubtless it was competent for the defendant to show that the savings bank had the beneficial interest in the subject of the suit in

order to let in any defense which it might have as against the bank; but it had no further interest in the matter. Assuming that the savings bank delivered these coupons to Dana for the purpose of enabling him to bring suit upon them, that he gave his check therefor, and that it was understood between them that he should turn over the proceeds of the collection to the bank, and take up his check,—which is a construction of the evidence as favorable to the defendant as it would bear,—still this would suffice to enable him to bring the suit in his own name. His right to recover would be no larger than that of the bank. In that respect he would stand precisely in its position, and, if the bank was a bona fide holder, he would recover in that character." *Village of Kent v. Dana*, 40 C. C. A. 281, 100 Fed. 56.

Practice in reviewing court; objections not urged in trial court.

971. (Mont. 1900.) On error in the Circuit Court of Appeals to a judgment of the Circuit Court in a mandamus proceeding awarding a peremptory writ requiring the officers of the city of Helena to pay a judgment recovered against that city, it was urged by the officers of the city that neither the petition nor the alternative writ showed title to the judgment in the relator, it, having been recovered by another, and no assignment to the relator being alleged. It was alleged however that it was beneficially interested as a taxpayer on property situated in the city and as an owner and holder of the judgment. Held, that it was too late to raise the objection for the first time in the Circuit Court of Appeals.

"No objection to the sufficiency of the petition was taken by demurrer or otherwise in the court below, and the answer of the defendants did not deny the allegation of the petition that the relator was the owner and holder of the judgment. The objection that the relator does not show title by assignment, not having been made in the court below, cannot be taken here. To hold otherwise would involve the exercise of original instead of appellate jurisdiction. This is not permitted to us." *Mayor, etc., of the City of Helena et al. v. United States ex rel. Helena Water Works Co.*, 43 C. C. A. 429, 104 Fed. 113.

Demurrer to complaint; error in refusal to grant motion waived by defendant; proceedings on error; no redress except for wrongful admission or rejection of evidence; allegation of reliance on copies of records; proof; presentation of bonds and coupons at place of payment; error in rejection of evidence.

972. (S. Dak. 1900.) It is no ground for demurrer to a complaint in an action on municipal funding bonds or interest coupons cut therefrom, that it does not contain averments to the effect that a fundable debt existed when the bonds were issued or that antecedent proceedings required by the enabling act had not been taken, or that the complaint contains no averment that the plaintiff bought them with notice of their defects.

"Any error in a refusal to grant the motion of a defendant to enter judgment in his favor at the close of the plaintiff's evidence is waived by the action of the defendant in subsequently introducing evidence on his own behalf and proceeding to the trial of the case on its merits."

"Where a jury is waived, and there is testimony raising a controversy, and the court finds generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence."

The complaint in a suit upon county bonds alleged that the plaintiff, when he purchased the bonds, relied upon certified copies of the records of proceedings of the board upon which the bonds were founded, and that such copies disclosed full power in the county to issue the bonds. This allegation was denied by the answer. Plaintiff's proof on this point was confined to the introduction of the bonds containing recitals importing compliance with legal requirements and his own and his vendor's testimony to the effect that they each purchased the bonds in good faith without notice of any defects in them, in reliance upon recitals contained in the bonds and the opinion of the attorney to whom the vendor had referred them for examination. Held, "The effect of this evidence was to leave the certified copies of the records as though they had never been pleaded, and the defendant in error without notice of

anything which they may have disclosed."

"The fact that the bonds and coupons were not presented for payment at the bank in New York where by their terms they were payable, was immaterial. There was no claim that the county had ever paid them, or endeavored to pay them; no claim that it had ever placed the money at the bank in New York to be applied to their payment. In this state of the case, the plaintiff was not required to go through the useless ceremony of presenting his coupons where there was nothing to pay them before he commenced his suit for the default of the county. The fact that coupons are made payable at a particular place does not make a presentation for payment at that place necessary before an action can be maintained upon them."

As against a bona fide holder of funding bonds issued by a county, it is not error to reject evidence offered by the defendant to show that there never was any fundable debt of the county for which the bonds could have been lawfully issued; that the county warrants for which they were issued were never delivered; that they were made without consideration, and were not even an apparent compliance with the provisions of the statute; that the bonds were never delivered to any purchaser and that no consideration for them was ever received by the county, when the answer admits that the bonds were in fact issued by the county, although it also alleges that they were issued fraudulently. *Hughes County, S. Dak., v. Livingston*, 43 C. C. A. 541, 104 Fed. 306.

Review on error; what questions considered by reviewing court.

973. (Kan. 1900.) "Six of the assignments of error are to the effect that the facts found by the trial court are not supported by the evidence. But it is well settled that when the trial court to which a cause has been submitted makes a special finding of facts this court has no authority to inquire whether the evidence supports the findings, but only whether the facts found support the judgment."

Several cases are cited to this proposition. *Syracuse Township, Hamilton County, Kan., v. Rollins*, 44 C. C. A. 277, 104 Fed. 958.

Parties in mandamus proceedings.

974. See No. 913.

Written stipulation waiving jury; in absence of what matters considered on error.

975. (Ohio, 1903.) "The record in the action at law contains numerous specifications of error, growing out of the admission or rejection of testimony, and based upon the rulings of the court in the progress of the trial. With respect to these, it is sufficient to point out that, although this case was tried and determined by the court without the intervention of a jury, there is nothing in the record to show that a stipulation in writing waiving a jury was filed with the clerk by the parties or their attorneys. This being the case, none of the rulings of the court in the progress of the trial, as presented by the bill of exceptions, can be re-examined and reviewed here. The only inquiry we can make is whether the judgment in favor of the plaintiffs below is sustained by the pleadings." A number of authorities cited by the court. *City of Defiance v. Schmidt*, 59 C. C. A. 159, 123 Fed. 1.

Judgment in suit by taxpayer not binding on bondholder who was not party to suit.

976. (Ill. 1906.) "The main reliance in support of the judgment is

the case of *St. L. A. & T. H. R. R. Co. v. People*, supra, relating to the bonded indebtedness in controversy, and we are of opinion that the conclusions in that case are inapplicable for another reason. It arose upon the appeal of a taxpayer from a judgment of the County Court for a delinquent 'road and bond tax,' levied on account of the same bonded indebtedness involved in the present suit, and the validity of the indebtedness was challenged, without the presence of bondholders. It was submitted upon stipulated facts that the bonds were voted and issued 'to construct of rock and macadam four different public roads in said town under section 20 of the act,' referred to, and plainly failed to show that several 'distinct and expensive improvements on the highways' were contemplated and made, as stated, not only in these bonds, but in the proceedings offered in evidence. The conclusion there reached, therefore, that bonds so issued and the tax levy to pay interest thereon were without authority of law, may well stand as unquestionable under the facts so submitted, but is in no sense binding against the bondholders, or upon the state of facts appearing in the present record." *Northwestern Savings Bank v. Town of Centreville Station, Ill.*, 74 C. C. A. 275, 143 Fed. 81.

B. Evidence in Municipal Bond Cases.**Possession evidence of title; burden of proof.**

977. (N. Y. 1864.) "The possession of such paper carries the title with it to the holder: The possession and title are one and inseparable. The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not

defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith. They are the same in effect. Where there is no fraud, there can be no question. The circumstances mentioned, and others of a kindred character, while inconclusive

in themselves, are admissible in evidence, and fraud established, whether by direct or circumstantial evidence, is fatal to the title of the holder." *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857.

Burden of proof by bona fide holder.

978. (Iowa, 1870.) "Treating the bonds and coupons sued on in this case, which are payable to bearer, as negotiable paper, and conceding to its fullest extent the protection which commercial usage throws around such paper in the hands of a bona fide purchaser for value before maturity, it is nevertheless undoubtedly true that circumstances may be shown in connection with the origin of such paper, which will devolve upon the holder the burden of showing that he did give value for it before maturity."

"The cases have established that if there be fraud or illegality in the inception of a bill or in the circumstances under which it was taken by the person who indorsed it to plaintiff he must prove consideration. That is established beyond controversy." *Smith v. Sac County*, 11 Wall. 139, 20 L. Ed. 102.

Proof of execution of bonds not required unless put in issue.

979. (Ala. 1874.) "On the trial the plaintiffs produced the bonds and coupons and offered to read the same in evidence. To this the defendants objected, for the reason that there was no evidence that the bonds were authorized to be issued by the defendants, and that there was no evidence that the seal annexed was the seal of the probate judge, or of the defendants. We have already considered this point, and have shown that the objection was not valid for either of the reasons mentioned. There was no issue upon the execution of the bonds." *Chambers County v. Clews*, 21 Wall. 317, 22 L. Ed. 517.

Proof of bona fides, when unnecessary, not erroneous.

980. (Mo. 1877.) "The plaintiff had a right to prove that he was a bona fide holder of the coupons."

The petition averred the fact. It

was denied by the answer. It is true the presumption of law, *prima facie*, was that the plaintiff was such holder. But if he chose to meet the issue by direct affirmative proof, it was clearly competent for him to do so.

Proof of irregularities against a bona fide holder.

"The testimony tending to show fraud and irregularities touching the issuing of the bonds and in disposing of them was properly rejected. The plaintiff being a bona fide holder of the coupons, it was incompetent to affect his rights. He could not be expected to know, and was not bound to know, the facts sought to be established."

That the enterprise was injudicious.

"The learned counsel for the plaintiff in error could hardly have been serious in insisting that proof that the road authorized by the charter to be built 'was a wild and visionary enterprise,' and that meetings of taxpayers denouncing the issuing of the bonds was competent in the case as it stood for any purpose. No further remark upon the subject is necessary." *County of Macon v. Shores*, 97 U. S. 272, 24 L. Ed. 889.

Exclusion of evidence of proceedings.

981. (N. Y. 1878.) "The proceedings of the county judge touching the issuing of the bonds, and the bonds themselves, were sought to be excluded. This proceeded upon a misconception of the law of evidence. The plaintiff had a right to exhibit his case. These documents, according to his view, were links in his chain of title to recover. To shut them out would have been to condemn him unheard, and to give judgment against him without trial. The admissibility of testimony under such circumstances and its effect after it is admitted and all the other evidence is in, are very different questions." *Orleans v. Platt*, 99 U. S. 576, 25 L. Ed. 404.

Proof of bona fides.

982. (Ill. 1880.) A petition in an action on bonds alleged ownership in the plaintiff but contained no averment

to the effect that he was a bona fide holder. Held, that under this allegation evidence was admissible to show plaintiff's bona fides. *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138.

County warrants; prima facie evidence of validity of debt; evidence admissible in defense of action upon.

983. (Ark. 1893.) County warrants are prima facie evidence of the validity of the debt they represent. They have not the attributes of negotiable commercial paper. In an action upon them evidence of their invalidity or defenses available against the original payee will not be excluded as in the case of negotiable instruments. *Wall v. County of Monroe*, 103 U. S. 74, 26 L. Ed. 430.

(Ark. 1893.) *Thompson v. Searcy County*; *Searcy County v. Thompson*, 6 C. C. A. 674, 57 Fed. 1030.

(Kan. 1894.) *Board of Comrs. of Hamilton County v. Sherwood*, C. C. A. , 64 Fed. 103.

Bona fides of holder; burden of proof in case of fraud shown.

984. (N. Y. 1881.) "It is an elementary rule that if fraud or illegality in the inception of negotiable paper is shown, an indorsee, before he can recover, must prove that he is a holder for value. The mere possession of the paper, under such circumstances, is not enough. *Smith v. Sac County*, 11 Wall. 139. Here the actual illegality of the paper was established. It was incumbent, therefore, on the plaintiff to show that he occupied the position of a bona fide holder before he could recover." *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866.

Proof, in absence of recitals in bonds, of compliance with law.

985. (Mo. 1881.) "To allow the present objection to prevail would require the plaintiff, not only to show that the persons voting to ratify the stock subscription were all taxpayers, but also that they had all the other requisite qualifications of persons entitled by law to vote. In our opinion, the law imposes no such unreasonable burden upon the owner of such bonds. He is bound to show, in the absence of recitals that prevent its denial, that

the corporation issued them, in the exercise of a power conferred by law; and where that can arise only in consequence of the performance of a condition precedent, such as the result of an election by a public vote, he has the burden of proof to show the fact. That fact, as in the present case, is fully proven by an exhibition of the record, which shows on its face the result claimed. He is not bound to sustain the truth of the record, as if it were the case of a contested election, and prove that the majority, on the existence of which his rights rest, consisted of persons, all of whom possessed the qualification of voters." *Hannibal v. Fauntleroy*, 105 U. S. 408, 26 L. Ed. 1103.

Proof of order for issuance of bonds, when unnecessary.

986. (Mo. 1881.) "It is conceded that, under the practice in Missouri, unless the execution of the bonds was denied under oath, their execution was admitted. There was no such denial here. Hence it was only necessary to prove such facts connected with the execution as were directly put in issue by the pleadings. The only defense relied on under this branch of the case was the authority of the court to make the order it did. All else was, therefore, admitted. As the presiding judge was necessarily the president of the court, the bonds are not invalid because signed by the president as presiding judge."

Evidence admissible to establish bona fides, though not pleaded.

Testimony was admissible to prove that the plaintiff was a bona fide holder and owner of the coupons sued on, notwithstanding there was no averment in the petition to that effect. *County of Ralls v. Douglass*, 105 U. S. 728, 26 L. Ed. 967.

Burden of proof; bona fide holding of bonds.

987. (Ill. 1882.) "Does the irregularity in the conduct of the election throw on the plaintiffs the burden of proving that they are holders for value?"

"There is no pretense of any fraud in the inception of the bonds in question in this case. It is not denied

that they were issued in good faith and for a valuable consideration. The question, then, arises, Is the irregularity in the conduct of the election such an illegality as throws on the plaintiff the burden to show that he paid value for the coupons? We are clearly of opinion that it is not. It will appear from an examination of the cases above cited in which the defense was illegality in the inception of the instrument, that the illegality which shifts the burden of proof on the holder to prove that he paid value must be something which relates to the consideration of the paper sued on. It must appear that the consideration arose out of a transaction contrary to law, or against public policy." *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. Rep. 704, 27 L. Ed. 424.

Proof of defenses under general denial of allegations of petition.

938. (Nebr. 1887.) The answer to a petition on bonds besides containing affirmative matters of defense which had been stricken out by the court below contained what was in effect a general denial of the allegations of the petition.

"It therefore put the plaintiff upon proof of every fact necessary to constitute the cause of action set out in his petition, and embraced a denial of the legality and validity of the bonds, and the lawfulness of their issue and delivery. It required the plaintiff to show by competent proof that he was the owner of the coupons sued on, taken from bonds in fact executed by the defendant, issued in accordance with law, and delivered to a party competent to receive the title. It permitted proof on the part of the defendant of every fact which tended to establish that the bonds were illegal and void. It follows, therefore, that every defense which was open to the defendant under that portion of the answer stricken out was equally open to it under the answer as it stood at the trial." *Nemaha County v. Fank*, 120 U. S. 41, 7 Sup. Ct. Rep. 395, 30 L. Ed. 584.

Rights of prior bona fide holder.

949. (N. Y. 1893.) "As the bonds in this case, though good upon their

face, were undoubtedly void as between the railroad company and the town of Lansing, it is incumbent upon the defendant Lytle to show that he, or some one through whom he obtained title to them, was a bona fide purchaser for a valuable consideration." *Orleans v. Platt*, 90 U. S. 676."

"In such a case, however, the plaintiff fulfills all the requirements of the law by showing that either he, or some person through whom he derives title, was a bona fide purchaser for value without notice. *Douglass County Comrs. v. Bolles*, 94 U. S. 104; *Montclair v. Ramsdell*, 107 U. S. 147; *Scotland County v. Hill*, 132 U. S. 107." *Lytle v. Lansing*, 147 U. S. 59, 13 Sup. Ct. Rep. 254, 37 L. Ed. 78.

Objections to offer of evidence; the exceptions to its admission.

990. (Colo. 1897.) "An examination of the records shows, however, that, while these assessment lists were objected to generally for immateriality when they were offered, yet no exception was saved when they were admitted. For this reason the objection to the assessment lists was waived, and cannot be noticed." *E. H. Rollins & Sons v. Board of Comrs. of Gunnison County, Colo.*, 26 C. C. A. 91, 80 Fed. 692.

County warrants; prima facie proof of claim evidenced by them; what defenses available; burden of proof.

991. (Kan. 1898.) A county warrant issued in pursuance of legal authority is prima facie proof of the validity of the claim it evidences.

"The board was empowered to hear and determine claims against the county, and to issue warrants therefor. These warrants evidence the decision and judgment of the board that the county is justly indebted to the holders thereof in the amounts stated therein. They are not conclusive evidence of the indebtedness they admit. The county may defeat them by proof that they were without consideration, that they were fraudulently issued to the damage of the county, or that the incurrence of the debts and the allowance of the claims they evidence were beyond the jurisdiction of the board.

But the presumption is that the action of the board was right and just, and the burden of establishing these defenses is upon the county. Until one of them is established, the warrants are prima facie evidence of just debts of the county, upon which the holder is entitled to judgment in any court of competent jurisdiction."

"It is conceded that a purchaser of these warrants does not secure the immunity from defenses accorded to the purchaser of commercial paper under the law merchant. He takes them subject to the defenses that the allowance of the debts and the issue of the warrants were not within the scope of the authority of the board, that they were without consideration, and that they were fraudulently created. In short, he takes them subject to all defenses which challenge the merits of the claims. Nevertheless the warrants themselves are prima facie evidence that the debts are just, and that defenses do not exist." *Speer v. Board of County Comrs. of Kearney County, Kan.*, 32 C. C. A. 101, 88 Fed. 749.

992. (Mich. 1890.) "The plaintiff by his counsel, produced the bonds, and thus arose the presumption that he was their owner." *Rondot v. Rogers Township*, 39 C. C. A. 462, 99 Fed. 202.

Evidence of ownership of bonds; possession; record of former suit by another person on same bonds; hearsay.

993. (Mo. 1900.) "The bonds and coupons were payable to bearer, and at the trial the plaintiff produced and read them in evidence. Possession of commercial securities is evidence of ownership, and the production of these bonds and coupons by the plaintiff at the trial was sufficient proof, in the absence of countervailing evidence, to determine this issue in his favor."

"To overcome this proof the defendant in error offered in evidence, over the objection of the plaintiff that it was incompetent, and did not tend to prove that he was not the owner of the bonds and coupons, the record of an action in the court below by one Norman De V. Howard, through Mr. T. K. Skinker, the attorney for the plaintiff in this case, against this defendant, on November 13, 1889, on

the same bonds and on some of the same coupons involved in this action. That record disclosed the fact that this action brought by Howard had never been tried, and that it was dismissed on March 2, 1891. The objection to this record was well taken. The statement or claim of Howard in his petition in that record that he owned the bonds and some of the coupons was hearsay." *Edwards v. Bates County*, 40 C. C. A. 161, 99 Fed. 905.

Burden of proof; indebtedness in excess of constitutional limitation; an affirmative defense.

994. (Iowa, 1900.) When it is claimed as a defense to municipal bonds that they create a debt in excess of a constitutional limit, such defense must be pleaded and proven.

"If they create a debt in excess of the constitutional limitation, that was an affirmative defense, and the burden was on the county to plead and prove it. It assumed the burden but it failed to bear it. It pleaded this defense but it failed to prove it." *Lyon County, Iowa, v. Keene Five-Cent Sav. Bank of Keene, N. H., et al.*, 40 C. C. A. 391, 100 Fed. 337.

Proof of corporate character; when not necessary.

995. (Cal. 1902.) In this case the defendant was sued on bonds purporting to have been issued by it. The complaint alleged that the defendant was a corporation duly organized and existing and that it had issued the bonds and coupons which were the subject of the action. The defendant appeared in its corporate name and demurred to the complaint. Thereafter it answered, denying that it was or ever had been incorporated and made full answer to the complaint on the merits.

Held, that by appearing generally and filing a demurrer and answering to the merits in its corporate name, it admitted its corporate existence for the purposes of the suit and could not thereafter, by denying such corporate existence, impose upon the plaintiff the burden of proving the fact.

Proof of execution of bonds.

Under California Code, in suit on bonds and coupons, when the com-

plaint contains copies of such bonds and coupons, unless the answer denying the execution of the instruments is verified, the defendant will be held to have admitted the genuineness and due execution of the bonds and coupons. *Perris Irrigation Dist. v. Thompson*, 54 C. C. A. 330, 116 Fed. 832.

Publication of ordinances; record prima facie of publication.

995a. (Colo. 1908.) "The ordinance was duly recorded in the 'Book of Ordinances' provided for by section 4443. That fact constituted prima facie evidence of its lawful publication. The statute conferring that prima facie effect was dictated by a wise public policy. New towns and cities of Colorado required for their proper development the construction of public buildings, sewers, water works, gas plants, bridges, and other like public utilities; and necessity frequently dictated that the cost of such improvements should be made a burden upon

the future as well as the present. Proof of the publication or posting of ordinances required for their lawful authorization might after the lapse of years be difficult. The successful accomplishment of public enterprises, dependent largely upon the ability to borrow money for the purpose, required some readily available and reliable method of proving compliance with conditions precedent to the validity of bonds to be issued as evidence of the loan. For reasons like these, the statutes of the state made the record of an ordinance in the 'Book of Ordinances' to be kept for that purpose prima facie evidence of its lawful publication. In view of these facts, courts ought not to permit this salutary presumption of regularity to be overcome by anything less than substantial proof of irregularity. There was no proof of it in this case, and the trial court rightly directed a verdict for plaintiff on the second count." *Town of Fletcher v. Hickman*, 91 C. C. A. 353, 165 Fed. 403.

CHAPTER XVI.

FEDERAL COURTS; JURISDICTION; RULES OF DECISION.

- A. Jurisdiction and process of federal courts; not subject to control by state legislation or state courts.
- B. Decisions of state courts; when controlling on federal courts and when not; changed rules of decision affecting contract rights.
 - 1. When federal courts will follow decisions of highest court of state.
 - 2. When federal courts exercise independent judgment.
 - 3. Change in rules of decision by state courts; contract rights protected by federal courts.

The Federal courts are not courts of general jurisdiction. Subject to the provisions of the Federal Constitution relating thereto, their jurisdiction is conferred, limited, and regulated by the acts of Congress. Without making special reference to any such constitutional provisions or acts of Congress, we have cited and noted in the first part of this chapter the decisions which have been made in municipal bond cases on questions relating to the jurisdiction of the Federal courts. The jurisdiction and process of the Federal courts are independent of, and cannot be controlled or interfered with by, the legislatures or courts of the States.

Questions frequently arise in causes prosecuted in the Federal courts as to what consideration should be given by those courts to the rules of decision of the courts of final jurisdiction of the States.

The Revised Statutes of the United States (§ 721) provide that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

It is well settled that this provision does not apply to questions of commercial law, or those involving the application of the general principles of the common law. The provisions of State Constitutions and statutes are controlling upon the Federal courts when no Federal question is involved, and, generally, when

the highest court of a State having jurisdiction of the matter has construed any provision of its Constitution or its statutes, such construction will be adopted and followed by the Federal courts, and where such State courts, by a course of decisions, have established a local rule of property, such decisions will generally be followed by the Federal courts.

If the State courts, by subsequent decisions, reverse or change the rules of their former decisions concerning such matters, the Federal courts, in cases before them, will disregard such subsequent decisions, if by following them the rights of persons, who contracted before such subsequent decisions were made, presumably with reference to, and in reliance upon, such former decisions, would be prejudiced; and in the absence of such decisions by the State courts at the time of contracting, the Federal courts exercise an independent judgment.

These rules are of special importance to purchasers and holders of municipal bonds as well as the corporate bodies issuing them, as questions involving the construction of both constitutional and statutory provisions frequently arise in cases prosecuted to enforce their collection, and the State courts do not always adhere to their first decisions in such matters.

A. Jurisdiction and Process of Federal Courts; Not Subject to Control by State Legislation or State Courts.

Jurisdiction of federal courts; not affected by state legislation; injunction by state courts; process of federal courts not affected thereby; discussion; impairing obligation of contract by removal of taxing power.

996. (Iowa, 1867.) A State court cannot enjoin or interfere with process of a Federal court.

"Where a State has authorized a municipal corporation to contract and to exercise the local power of taxation to the extent necessary to meet the engagement, the power thus given cannot be withdrawn until the contract is satisfied."

"Authority of the Circuit Courts to issue process of any kind which is necessary to the exercise of jurisdiction and agreeable to the principles and usages of law, is beyond question, and the power so conferred cannot be controlled either by the process of the State courts or by any act of a State legislature."

"Repeated decisions of this court have also determined that State laws, whether general or enacted for the particular case, cannot in any manner limit or affect the operation of the process or proceedings in the Federal courts."

The Constitution itself becomes a mockery if the State legislatures may at will annul the judgments of the Federal courts and the nation is deprived of the means of enforcing its own laws by the instrumentality of its own tribunals.

"State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the National courts."

"Viewed in any light, therefore, it is obvious that the injunction of a State court is inoperative to control, or in any manner to affect the process or proceedings of a Circuit Court, not on account of any paramount jurisdiction in the latter courts, but because,

in their sphere of action, Circuit Courts are wholly independent of the State tribunals." *Riggs v. Johnson County*, 6 Wall. 166, L. Ed.

Federal courts decide all questions relating to their process.

997 (Iowa, 1869.) In a mandamus proceeding against a city to compel the levy of a tax to pay a judgment rendered against the city, it was held that as the case involved the process of the Federal court, it was peculiarly the province of that court to decide all questions relating to that subject. *Butz v. City of Muscatine*, 8 Wall. 575, 19 L. Ed. 490.

Jurisdiction of supreme court of United States on error to supreme court of state.

998. (S. Car. 1877.) "The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded under the shield of State legislation, this court is authorized to interfere. The form and mode in which the Federal question is raised in the State court is of minor importance, if, in fact, it was raised and decided. The act of Congress of 1867 gives jurisdiction to this court over final judgments in the highest courts of a State in suits 'where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.' Not a word is said respecting the mode in which it shall be made to appear that such a question was presented for decision. In the present case, it was necessarily involved, without any formal reference to any clause in the Constitution, and it is difficult to see how any such reference could have been made to appear expressly.

"In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the State court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question

was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held that we may review the judgments of a State court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised." *Murray v. Charleston*, 26 U. S. 432, 24 L. Ed. 760.

Removal of cause from state court to federal court.

999. (Ill. 1880.) "We do not doubt that the suit was one which the defendant was entitled, under the act of March 3, 1875, chap. 137, to remove from the State court. Disregarding as we may do, the particular position, whether as complainants or defendants; assigned to the parties by the draughtsman of the bill, it is apparent that the sole matter in dispute is the liability of the township upon the bonds; that upon one side of that dispute are all of the State, county, and township officers and taxpayers, who are made parties, while upon the other is Kernochan, the owner of the bonds whose validity is questioned by this suit. He, alone, of all the parties, is, in a legal sense, interested in the enforcement of liability upon the township. It is, therefore, a suit in which there is a single controversy, embracing the whole suit, between citizens of different States, one side of which is represented alone by Kernochan, a citizen of Massachusetts, and the other by citizens of Illinois."

Removal cases, 100 U. S. 457; *Harter v. Kernochan*, 103 id. 562, 26 L. Ed. 411.

See also *Wilson v. Oswego Township*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70.

Municipal corporations of Michigan can be sued in circuit court of United States in action at law.

1000. (Mich. 1882.) "An action at law can be maintained in the Circuit Court of the United States against a municipal corporation of Michigan upon municipal bonds or the coupons for interest attached thereto."

"There is no law of the State prohibiting such a suit. All that has been

determined is that, in the courts of the State, a judgment is not necessary to lay the foundation for a writ of mandamus to require the officer to do his duty."

Jurisdiction of federal courts in suit by assignee of obligation of a municipal corporation.

"The Circuit Court of the United States has jurisdiction of a suit brought by a citizen of a State other than Michigan to recover the amount due on an obligation of a municipal corporation of Michigan, for the payment of a sum of money to a corporation of Michigan or bearer, or to bearer."

"Under the act of 1789 it was always held that an obligation payable to bearer, or to an individual or bearer, did not come within the prohibition of suits by assignees." *Chick-aming v. Carpenter*, 106 U. S. 663, 1 Sup. Ct. Rep. 620, 27 L. Ed. 307.

Jurisdiction by fictitious transfer of bonds.

1001. (Maine, 1885.) In this case the Federal statutes relating to the jurisdiction of the Federal courts to entertain suits on negotiable instruments, and a number of decisions on the subject are reviewed. And it was held that in actions upon such instruments when it appears that the holder has received a transfer of them for the purpose of bringing an action in the Federal court, the assignor being still the real owner and not entitled to sue in that court, the case should be dismissed. *Farmington v. Pillsbury*, 114 U. S. 138, 5 Sup. Ct. Rep. 807, 29 L. Ed. 114.

Jurisdiction of supreme court of United States on error to highest court of state.

1002. (La. 1888.) "This being a writ of error to the highest court of a State, a Federal question must have been decided by that court against the plaintiff in error; else this court has no jurisdiction to review the judgment. As was said by Mr. Justice Story, fifty years ago, upon a full review of the earlier decisions, 'it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment,' and 'it is not sufficient to show that a question might have arisen or been applicable to the case,

unless it is further shown, on the record, that it did arise, and was applied by the State court to the case.'" *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 8 Sup. Ct. Rep. 741, 31 L. Ed. 607; *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. Rep. 921, 31 L. Ed. 763.

Municipal corporations are liable to suit in federal courts.

1003. (Nev. 1890.) "It is enough for this case that we find the board of supervisors to be a corporation authorized to contract for the county. The power to contract with citizens of other States implies liability to suit by citizens of other States, and no statute limitation of suability can defeat a jurisdiction given by the Constitution." *Lincoln County v. Luring*, 133 U. S. 529, 10 Sup. Ct. Rep. 363, 33 L. Ed. 766.

Federal courts have jurisdiction of any action that can be maintained in a state court.

1004. (Ark. 1893.) "If by the law obtaining in the State, customary or statutory, they (suits) can be maintained in a State court, whatever designation that court may bear, we think they may be maintained by original process in a Federal court where the parties are, on one side, citizens of Louisiana and, on the other, citizens of other States." *Gaines v. Funtes*, 92 U. S. 10, 20, followed.

Jurisdiction of federal courts cannot be impaired by state laws.

"But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases State laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the States, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. *Suydam v. Broadnax*, 14

Pet. 67; *Union Bank v. Jolly's Administrators*, 18 How. 503. This principle has been steadily adhered to by this court." *Hyde v. Stone*, 20 How. 170, followed. *Chicot County v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. Rep. 695, 37 L. Ed. 546.

Jurisdiction of federal courts.

1005. (N. Y. 1895.) "Finally, the jurisdiction of the trial court is challenged on the ground that under the act of Congress of March 3, 1887, chap. 373, 24 Stat. 552, as amended by the act of August 13, 1888, chap. 866, 25 Stat. 433, a subsequent holder of negotiable paper payable to bearer cannot invoke the jurisdiction of the Federal courts unless the original holder was also entitled to sue therein. But the statute excepts from this provision instruments made by a corporation, and a town under the laws of the State of New York is a corporation, so far as respects the making of contracts, the right to sue and the liability to be sued." *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. Rep. 954, 39 L. Ed. 990.

Action on county warrants by non-resident assignee; federal courts have jurisdiction.

1006. (Kan. 1895.) The Federal courts have jurisdiction of an action against a county on its warrants which were made payable to the persons therein named, or bearer, by an assignee thereof, when such assignee is a non-resident of the State in which such county is situated. *Board of Comrs. of Kearney County v. McMaster*, 15 C. C. A. 353, 68 Fed. 177.

Bonds payable to "_____ or order;" same as if payable to bearer or holder; action by assignee; jurisdiction not dependent upon right of assignor to sue in federal court.

1007. (Iowa, 1900.) "Some of the bonds upon which the judgments were founded were issued by the county to citizens of Iowa, and were by them sold and delivered to citizens of other States, while they read in this way, 'The county of Lyon, in the State of Iowa, for value received promises to pay _____ or order' the amount named in the bond; and it is said that the court below had no jurisdiction of the causes of action based upon these bonds, because the act of Congress of August 13, 1888 (25 Stat. 434), reads:

"Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

"Under this act an action cannot be maintained in the Circuit Court upon an instrument made by a corporation which is not payable to bearer, unless such an action could have been maintained by the assignor of the plaintiff. But, if such an instrument is payable to the bearer, its holder may recover upon it in the Federal court, whether his assignor could have done so or not."

"A bond or note of a corporation payable to '_____ or order' is, in legal effect, payable to the holder or bearer. It has every attribute of that class of commercial paper which the bearer may enforce in the Federal courts without proof that his assignor could have done so, and he may maintain an action upon it whether his assignor could have done so or not." *Lyon County, Iowa, v. Keene Five-Cent Sav. Bank of Keene, N. H., et al.*, 40 C. C. A. 391, 100 Fed. 337.

Jurisdiction of federal courts in suits on instruments payable "to bearer" or "to order."

1008. (Iowa, 1901.) "The act of congress of August 13, 1888 (25 Stat. 434), contains this provision:

"Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose of action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

"Under this statute an action can not be maintained in the circuit court upon an assigned instrument made by a corporation, which is not payable to bearer, unless such an action could have been maintained by the assignor. If, however, the assigned instrument

is payable to the bearer, the assignee may recover in the Federal court, whether his assignor could have done so or not. In the case now in hand the bonds were payable to the order of a citizen of the State of the defendant, and, because he could not have maintained an action in the Federal court, no subsequent holder could do so. But the coupons, on the other hand, were payable to bearer, and were made by a municipal corporation, so that they fell within the express terms of the exception to the prohibition of the statute; and any holder of them who was a citizen of a different State from that of the plaintiff in error could lawfully maintain his action upon them in the national courts."

Joining nonjurisdictional causes of action with jurisdictional.

Joining causes of action of which the court cannot take jurisdiction with those of which it has jurisdiction does not deprive the court of its jurisdiction of the latter, if they are sufficient in amount. *Independent School District v. Rew*, 111 Fed. 1, 49 C. C. A. 198.

Jurisdiction of federal court depends on the amount claimed.

1009. (Neb. 1901.) "The amount claimed in the declaration or complaint, not the amount of the recovery, is the test of jurisdiction; and the fact that a sum in excess of \$2,000, exclusive of interest and costs, was claimed, gave the trial court jurisdiction to render a judgment for a less amount, unless this court is able to find that a demand for a sum in excess of \$2,000 was interposed in bad faith, for no other purpose than to give the Federal court jurisdiction." *Washington County v. Williams*, 111 Fed. 801, 49 C. C. A. 621.

Suit on bonds and coupons transferred to plaintiff for collection in federal court when amount was insufficient to enable assignor to sue in that court.

1010. (Cal. 1902.) Plaintiff prosecuted an action in the Federal court

on bonds and coupons, some of which had been transferred to him for collection only and were in amounts less than \$2,000.00.

"No owner of coupons, aggregating less than \$2,000.00, could have sued in the Circuit Court by reason of the bonds to which they were attached (but which were not due) exceeding the jurisdictional amount. But when the several owners of \$50.00 coupons which were due, but which coupons were attached to bonds not due, put them all in the hands of the plaintiff for collection, the amount appeared to be sufficient for purposes of jurisdiction. Thus a case was made by which the Circuit Court was led to take cognizance of certain claims too small for its jurisdiction if they had been severally sued on by the real owners, although there was jurisdiction as to the parties who owned eight of the nine bonds in suit. It also appears that one of the transferrers of the plaintiff owned only one bond of \$1,000. The value of the matter in dispute, as to him, was only the amount of that bond and one coupon of \$50.00.

"We adjudge that, as the plaintiff does not own the bonds or coupons in suit, but holds them for collection only, the Circuit Court was without jurisdiction to render judgment upon any claim or claims, whether bonds or coupons, held by a single person, firm or corporation against the city and which, considered apart from the claim or claims of other owners, could not have been sued on by the real owner by reason of the insufficiency of the amount of such claim or claims." *Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. Rep. 327, — L. Ed. —.

Action to recover on bonds by joint owners.

1011. (Ky. 1909.) In an action for judgment on bonds of the same series as those involved in the case of *Green County v. Quinlan* (No.), by a number of persons claiming to be joint owners of the bonds, on issue joined the Circuit Court found that plaintiffs were joint owners. This

finding was necessary to confer jurisdiction upon the court.

Held: "The first finding of the court was that the plaintiffs at the date of the beginning of the suit were 'the bona fide holders for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court.' This is a finding which, among other things, supports the jurisdiction of the court, and could proceed only upon the theory that the plaintiffs were the joint owners and holders of the bonds and coupons sued on. If they were, the court had jurisdiction under the rule stated in *Clay v. Field*, 138 U. S. 464, 470." *Green County v. Thomas' Executor*, 211 U. S. 508, 20 Sup. Ct. Rep. 168, — L. Ed. —.

Jurisdiction of federal court; amount in controversy.

1012. (Kan. 1902.) "In cases of this kind it is the sum actually claimed in good faith by the plaintiff when he files his declaration or complaint which determines the jurisdiction of the court, and the fact that the plaintiff may not succeed in recovering all that he asks will not affect the jurisdiction of the court. *Schunk v. Moline, Milburn & Stoddart Co.*, 147 U. S. 500, 504, 13 Sup. Ct. 416, 37 L. Ed. 255; *Washington Co. v. Williams*, 49 C. C. A. 621, 111 Fed. 801, 811." Board of Commissioners *v. Vandriess*, 53 C. C. A. 192, 115 Fed. 866.

Jurisdiction of federal court; amount in dispute.

1013. (Iowa, 1902.) In a suit by a taxpayer to restrain a city from issuing bonds on the ground that such issue would exceed the constitutional limitation, the amount of bonds that the city proposed to issue was held to be the matter in dispute, for the purpose of deciding whether the Federal court had jurisdiction. *City of Ottumwa v. City Water Supply Co.*, 56 C. C. A. 219, 119 Fed. 315.

Federal court has jurisdiction of action against county by holder of void funding bonds to be subrogated to rights of holders of county warrants which had been funded.

1014. (Kan. 1903.) "County warrants are certainly choses in action made by a corporation, and, when drawn payable to bearer, they are negotiable, in a certain sense, although negotiation does not cut off all equities of defense, and in that respect they are unlike negotiable promissory notes and bills of exchange. The Judiciary Act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the Enrollment Act of August 13, 1888, c. 806, 25 Stat. 433 (U. S. Comp. Stat. 1901, p. 508), permits the assignee of choses in action payable to bearer, and made by a corporation to sue thereon in the Federal courts, if he is not a citizen or resident of the State where they were issued, and the jurisdiction of the Federal courts in such cases has frequently been upheld." Board of Comrs. of Kearny County, *Kans.*, *v. Irvine*, 61 C. C. A. 607, 126 Fed. 689.

Jurisdiction of federal court; amount involved in suit.

1015. (Mont. 1909.) An action to enjoin the making of a contract for the construction of a city water system and the issuance of bonds of the city. It was urged that the amount in controversy was not sufficient to confer jurisdiction of the Federal district court.

"It is not alleged in the bill that the first of the annual assessments about to be levied upon the appellee's property will exceed \$2,000 exclusive of interest and costs, and in the answer it is alleged that the first assessment will be but \$398.50. But the bill does allege that, if the bonds issue and become obligations of the city, the taxes on the appellee's property to pay interest on the bonds from year to year and to provide a sinking fund for the redemption thereof will exceed in the total the sum of \$10,000.

"The appellant relies upon decisions such as *Holt v. Indiana Mfg. Co.*, 178 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374, in which it is held that, in a suit to enjoin the collection of a certain specific annual tax, the future taxes which may be affected by the decision cannot be included in determining

the value of the matter in dispute. But the present case does not come within the doctrine of those decisions. Here the main and primary purpose of the bill is, not to enjoin the collection of a sum claimed to be due as a tax, but to enjoin the execution of a contract for the construction of a water system and to restrain the issuance and delivery of bonds of \$800,000. In such a case it is sufficient to sustain the jurisdiction if it appear that the total burden of future taxation that will be imposed upon the complainant's property by the threat-

ened action equals or exceeds the jurisdictional amount. The question of the power of the municipality to take the proposed step and to create the liability to taxation being involved, the amount in controversy is the sum of the complainant's taxation—not his taxes for one year, but his taxes for the whole period of his liability thereunder."

A number of decisions noticed and discussed. *City of Helena v. Helena Waterworks Co.*, 97 C. C. A. 320, 173 Fed. 18.

B. Decisions of State Courts; When Controlling on Federal Courts and When Not; Changed Rules of Decision Affecting Contract Rights.

1. When Federal Courts will Follow Decisions of Highest Court of State.

State decisions on constitutionality of state statute.

1016. (Pa. 1860.) Counsel for the city in this case urged that the act under which the bonds were issued was unconstitutional.

"Agreeing with him in the main, as to the foundations upon which the correctness of legislation should be tested, and the objects for which it ought to be approved, we cannot, with the respect which we have for the judiciary of his State, discuss the imputed unconstitutionality of the acts upon which the subscriptions were made to the Ohio and Pennsylvania Railroad Company; it having been repeatedly decided by the judges of the courts of Pennsylvania, including its Supreme Court, that acts for the same purposes as those are, which we have been considering, were constitutional." *Amey v. The Mayor, Aldermen, and Citizens of Allegheny City*, 24 How. 364, 16 L. Ed. 614.

Following state decisions in construction of state statutes.

1017. (Iowa, 1873.) "That the construction of the statutes of a State by its highest courts, is to be regarded

as determining their meaning and generally as binding upon United States courts, cannot be questioned. It has been asserted by us too often to admit of further debate. We have even held that when the construction of a State law has been settled by a series of decisions of the highest State court, differently from that given to the statute by an earlier decision of this court, the construction given by the State courts will be adopted by us. And we adopt the construction of a State statute settled in the courts of the State, though it may not accord with our opinion. There is every reason for this in the consideration of statutes defining the duties of State officers. It is true, that when we have been called upon to consider contracts resting upon State statutes, contracts valid at the time when they were made according to the decisions of the highest courts of the State, contracts entered into on the faith of those decisions, we have declined to follow later State court decisions declaring their invalidity. But in other cases we have held ourselves bound to accept the construction given by the courts of the States to their own statutes." Butz

v. City of Muscatine, 8 Wall. 575, distinguished. *Supervisors v. United States*, 18 Wall. 71, 21 L. Ed. 771.

Constitutionality of enabling statute. 1018. (N. Y. 1873.) The Supreme Court held that a certain enabling statute did not violate any provision of the Constitution of New York, but say: "If the Court of Appeals of New York had decided otherwise we should feel constrained to follow its decision, but no such determination has been made." *Town of Queensbury v. Culver*, 19 Wall. 83, 22 L. Ed. 100.

State decisions on constitutionality of statute.

1019. (Ala. 1874.) "The constitutionality of the act of the legislature authorizing the issue of these bonds has been examined by the Supreme Court of Alabama, and the act has been held to be valid. These decisions are binding upon us, and we see no occasion to controvert them." *Chambers County v. Clews*, 21 Wall. 317, 22 L. Ed. 517.

Following state decisions.

1020. (Ill. 1875.) "We are not called upon to vindicate the decisions of the Supreme Court of Illinois in these cases, or approve the reasoning by which it reached its conclusions. If the questions before us had never been passed upon by it, some of my brethren who agree to this opinion might take a different view of them. But are not these decisions binding upon us in the present controversy? They adjudge that the bonds are void, because the laws which authorized their issue were in violation of a peculiar provision of the Constitution of Illinois. We have always followed the highest court of the State in its construction of its own Constitution and laws. It is only where they have been construed differently at different times, that, in cases like this, we have adopted as a rule of action the first decision, and rejected the last." *Township of Elmwood v. Marcy*, 92 U. S. 289, 23 L. Ed. 710.

State court's decision as to constitutionality of statute.

1021. (Kan. 1876.) In an action on bonds the defendant county contended that the act relied upon as authority for their issue was never legally passed, and was therefore void. Held, "the recent decision upon this identi-

cal statute by the Supreme Court of Kansas, in a suit against this county, relieves us from all embarrassment upon this question. It gives effect and construction to one of its own statutes, and, according to well-settled rules, will be followed by this court. The question is discussed at much length, many local authorities in support of their conclusion are cited, and the act is held to have been legally passed, and to be a binding act. We must hold in accordance with this decision." *County of Leavenworth v. Barnes*, 94 U. S. 70, 24 L. Ed. 62.

Construction of state statutes.

1022. (Ill. 1876.) "If the Supreme Court of a State gives construction to the language of a statute, and there have been no conflicting decisions, this court, as a general rule, follows the construction thus given. *Township of Elmwood v. Marcy*, 92 U. S. 289" (23 L. Ed. 710). *Township of East Oakland v. Skinner*, 94 U. S. 255, 24 L. Ed. 125.

Construction of state constitutional provisions; requirement as to passage of act by legislature.

1023. (Ill. 1876.) "In the construction of the constitutional provisions above recited, the Supreme Court of Illinois, by a long course of decisions, has held that it is necessary to the validity of a statute that it should appear by the legislative journals that it was duly passed in the manner required by the Constitution."

"It is declared by the Judiciary Act as a fundamental principle 'that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in the cases where they apply.' § 34. And this court has always held that the laws of the States are to receive their authoritative construction from the State courts, except where the Federal Constitution and laws are concerned; and the State Constitutions, in like manner, are to be construed as the State courts construe them. This has been so often laid down as the proper rule, and is in itself so obviously correct, that it is unnecessary to refer to the authorities."

"As a matter of propriety and right, the decision of the State courts on the question as to what are the laws of the State, is binding upon those of the United States." *Town of South Ottawa v. Perkins*; *Supervisors of Kendall County v. Post*, 94 U. S. 200, 24 L. Ed. 154.

State supreme court decisions construing state statute.

1024. (Mo. 1877.) On the proper construction of a statute of Missouri, after reviewing the decisions of the Supreme Court of that State, the court say:

"We conclude, therefore, that the Supreme Court of Missouri when it decided the case of the State v. Linn County, and held the law in question to be constitutional, did not overlook the objection which is now made, but considered it settled by previous adjudications. The case is, therefore, to be considered as conclusive upon this question, as well as upon that which was directly considered and decided, and, as a rule of State statutory and constitutional construction, is binding upon us. It follows that our decision in *Harshman v. Bates County*, in so far as it declares the law to be unconstitutional, must be overruled." *County of Cass v. Johnson*, 95 U. S. 360, 24 L. Ed. 419.

When state decisions controlling.

1025. (Ill. 1879.) "It thus appears to have become a rule of property in the State that municipal bonds, issued to railroad companies on account of donations voted by the people before the adoption of the Constitution, are valid, though not issued until after the adoption. Such was the earliest exposition of the Constitution, made by the court of last resort in the State, twice since recognized by it, and recognized also by repeated legislative action. There is every reason to believe that the rule has been relied upon, and that on the faith of it many municipal bonds have been issued, bought, and sold in the markets of the country." A discussion of the subject and a number of cases noticed in the opinion. *Fairfield v. County of Gallatin*, 100 U. S. 47, 25 L. Ed. 544. Followed in *Louisville v. Savings Bank*, 104 U. S. 469, 26 L. Ed. 775.

Following state decisions in the construction of state statutes.

1026. (Ill. 1880.) "As a rule, we treat the construction which the highest court of a State has given a statute of the State as part of the statute itself. It is only when, by giving such construction a retroactive effect, it will invalidate contracts which in our opinion were lawfully made, that we disregard them." *Weightman v. Clark*, 103 U. S. 256, 26 L. Ed. 392.

Construction of state constitution by state courts.

1027. (Ill. 1881.) "The construction uniformly given to the Constitution of a State by its highest court is binding on the courts of the United States as a rule of decision."

"An act of the legislature of a State, which has been held by its highest court not to be a statute of the State, because never passed as its Constitution requires, cannot be held by the courts of the United States, upon the same evidence, to be a law of the State." *Post v. Supervisors; Amoskeag Bank v. Ottawa*, 105 U. S. 667, 26 L. Ed. 1204.

Construction of state constitutions and statutes by state courts.

1028. (Tenn. 1886.) "Upon the construction of the Constitution and laws of a State, this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some principle of the Federal Constitution, or of a Federal statute, or a rule of commercial or general law." Held, accordingly, following the decisions of the Supreme Court of Tennessee, that the act of the legislature of that State creating boards of county commissioners to supersede county courts composed of justices of the peace elected in the several districts of the counties, was in conflict with the Constitution of the State.

"It would lead to great confusion and disorder if a State tribunal, adjudged by the State Supreme Court to be an unauthorized and illegal body, and thus make the claims and rights of suitors depend, in many instances, not upon settled law, but upon the contingency of litigation respecting them being before a State or a Federal court. Conflicts of this kind

should be avoided if possible by leaving the courts of one sovereignty within their legitimate sphere to be independent of those of another, each respecting the adjudications of the other on subjects properly within its jurisdiction. On many subjects the decisions of the courts of a State are merely advisory, to be followed or disregarded, according as they contain true or erroneous expositions of the law, as those of a foreign tribunal are treated. But on many subjects they must necessarily be conclusive; such as relate to the existence of her subordinate tribunals; eligibility and election or appointment of their officers; and the passage of her laws. No Federal court should refuse to accept such decisions as expressing on these subjects the law of the State. If, for instance, the Supreme Court of a State should hold that an act appearing on her statute-book was never passed and never became a law, the Federal courts could not disregard the decision and declare that it was law and enforce it as such." *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. Ed. 178.

State court's decision construing statute.

1029. (Ky. 1887.) "The only question necessary to be considered is, whether the justices of the peace of Muhlenburg county constitute a necessary part of the County Court when levying a tax to pay plaintiff's judgment."

"Upon this point there seems to be a settled course of decision in the highest court of Kentucky; and upon such a subject as the organization or composition of a tribunal established by the fundamental law of the State, those decisions are, at least, entitled to great weight. *Burgess v. Seligman*, 107 U. S. 20, 34; *Claiborne County v. Brooks*, 111 U. S. 400, 410; *Norton v. Shelby County*, 118 U. S. 425." *Meriwether v. Muhlenburg County Court*, 120 U. S. 354, 7 Sup. Ct. Rep. 563, 30 L. Ed. 653.

Requirements of state statute construed to be mandatory by state supreme court; decision followed by federal court as to bonds issued after such state decision.

1030. (Ill. 1888.) The Supreme Court of Illinois, before the bonds involved in this case were issued, decided that it was essential to the validity of bonds issued in aid of railroads, re-

gardless of the bona fides of any holders thereof, that the requirements of a certain statute of that State, with reference to conditions precedent to the issuance of such bonds, should be complied with.

This court follows said decision by the Supreme Court of Illinois, and holds that the bonds in suit are void for the reason that the conditions precedent contained in the proposition submitted to the voters of the county, as provided in said statute, had not been complied with. *German Savings Bank v. Franklin County*, 128 U. S. 526, 9 Sup. Ct. Rep. 159, 32 L. Ed. 519.

Decisions of state supreme court.

1031. (N. Car. 1901.) Held: (1) That the Circuit Court of the United States should have regarded the decisions of the Supreme Court of North Carolina in *Union Bank v. Oxford Comrs.*; *Stanly County Comrs. v. Snuggs*; *Rodman v. Washington*; *Wilkes County Comrs. v. Call*, and *Buncombe County Comrs. v. Payne*, above cited, as controlling upon the inquiry whether the legislative enactments of 1868, 1879, and 1881 were passed in such manner as to become, under the Constitution, laws of the State. (2) That the rights of the parties in this case are determinable by the law of the State as it was declared by the State court to be at the time the bonds here involved were made in the name of the county and put upon the market. *Board of Comrs. of Wilkes County v. Coler*, 180 U. S. 506, 21 Sup. Ct. Rep. 458.

Decisions of state courts.

1032. (Kan. 1893.) "In the absence of any question of commercial law, and of any question involving a violation of the National Constitution, laws, or treaties, the Federal courts follow the construction of State statutes given by the highest judicial tribunal of the State in the interest of uniformity of decision and harmony of action between the National and State systems of jurisprudence." *West Plains Township, Meade County, v. Sage et al.*, 16 C. C. A. 553, 69 Fed. 943. See also *Lobenstine v. Union El. Co.*, 25 C. C. A. 304, 80 Fed. 9.

Following state decisions in construction of state constitution.

1033. (Kan. 1897.) The construction which has been placed on a provision

of the Constitution of a State by the Supreme Court of such State is binding upon the Federal tribunals, and following the decision of the Supreme Court of Kansas,—held, that, under the provisions of section 17 of article 2 of the Constitution of that State, that “All laws of a general nature shall have a uniform operation throughout the State; and in all cases where a general law can be made applicable no special law shall be enacted,” the legislature of a State is left at full liberty to determine whether in a given case a general law can be made applicable, and that the legislature of Kansas has power to pass a special law applicable to Kiowa county alone, authorizing that county to issue bonds within one year after its organization, when, by the provisions of a general law, counties were prohibited from so incurring indebtedness within such period of one year. *Rathbone v. Board of Comrs. of Kiowa County*, Kan., 27 C. C. A. 477, 83 Fed. 125.

1034. (Nebr. 1898.) The Federal courts take judicial notice of the general laws of the several States. *Deuel County, Nebr., v. First National Bank of Buchanan County, Mo.*, 30 C. C. A. 30, 86 Fed. 264.

Constitutional provision prohibiting special laws, where general laws can be made applicable; a question for legislature to determine; state decision followed.

1035. (Kan. 1898.) This court follows the rule of decision of the Supreme Court of Kansas in holding that, under the constitutional provision of that State, that “All laws of a general nature shall have a uniform operation throughout the State; and in all cases where a general law can be made applicable, no special law shall be enacted,” the determination of the question whether or not a general law can be made applicable to any subject is a purely legislative function, and the enactment of a special law, even when a general law on the subject is already in force, settles the question and makes the special law impregnable to attack under this clause of the Constitution of that State. *Board of Comrs. of Seward County, Kan., v. Aetna Life Ins. Co.*, 32 C. C. A. 585, 90 Fed. 222.

Construction of state statute authorizing refunding of “matured and maturing” indebtedness; state decision followed.

1036. (Kan. 1898.) It having been urged, in an action upon coupons from refunding bonds issued by the board of county commissioners of Haskell county, that the bonds were void because the board of commissioners had authority, under the act of 1879, to refund “matured and maturing” indebtedness only, and that the debt refunded would not become due until 1909, held, that the objection was not tenable, because, “According to the construction given to chapter 50 of the Laws of 1879 by the Supreme Court of Kansas, which must prevail here, that chapter authorized the board of county commissioners to refund with negotiable bonds all indebtedness of the county that was due at the time of its passage or that might at any time become due.” *Board of Comrs. of Haskell County, Kan., v. National Life Ins. Co. of Montpelier, Vt.*, 32 C. C. A. 591, 90 Fed. 228.

State decisions; federal courts lean toward same views.

1037. (Ill. 1899.) “In other words, as the act of 1871 had not been construed by the Supreme Court of Illinois when the bonds held by the plaintiffs were issued, it is the province and duty of this court to exercise an independent judgment as to its validity under the Constitution of Illinois. But in doing this there are two principles that should not be overlooked: (1) That, although the act of 1871 may not have been expressly the subject of judicial construction before the rights of the plaintiffs accrued, this court should give effect to any rules of construction that may have been previously established by the highest court of the State when interpreting similar provisions in the Constitution of 1848; (2) that the Federal courts, for the sake of harmony and to avoid confusion, should ‘lean towards an agreement of views with the State courts, if the question seems to them balanced with doubt,’ and endeavor to avoid ‘any unseemly conflict with the well-considered decisions of the State courts’ upon questions of local law. These considerations have peculiar, if not controlling, weight when the question to be determined relates to the

jurisdiction or power, under the fundamental law of a State, of tribunals or bodies created by legislative enactment, and charged with the performance of public duties. As the Supreme Court of Illinois held that the act of 1871 was repugnant to the State Constitution of 1870, so far as it authorized improvements by special assessments through the agency of county courts, commissioners, and juries, the Federal court, when exercising its independent judgment, should not act upon a different view of the State Constitution, unless compelled to do so by reasons so obviously sound that to refuse to follow them to their logical conclusion would be an absolute denial of justice." *O'Brien et al. v. Wheelock et al.*, 37 C. C. A. 309, 95 Fed. 883.

Construction of constitution by supreme court of state.

1038. (N. Car. 1899.) "The questions raised by this appeal, and the legislation involved with the same, have been directly considered by the Supreme Court of the State of North Carolina, and the decisions of that court have been against the contention of the complainants below."

"With these decisions of the Supreme Court of North Carolina we are in full accord. If we had reached a different conclusion, nevertheless would not the determination of the court of last resort in North Carolina, upon the questions involved herein relating as they do to the Constitution of that State, and to the validity of certain acts of its general assembly and their construction be respected by this court? Indeed, are we not bound by them?" *Board of Comrs. of Stanley County, N. Car., et al. v. Coler et al.*, 37 C. C. A. 484, 96 Fed. 284.

Initial decision and subsequent different decision by state supreme court after acquisition of bonds by plaintiff.

1039. (N. Car. 1899.) A holder of municipal bonds has no ground for complaining that a rule of decision

announced by the Supreme Court of a State in one case has been changed by a subsequent decision of the same court when both the former and subsequent decisions were made after he acquired his bonds. *Board of Comrs. of Oxford, N. Car., et al. v. Union Bank of Richmond, Va.*, 37 C. C. A. 493, 96 Fed. 293.

Construction of constitutional and statutory provisions.

1040. (N. Car. 1899.) "The Supreme Court of North Carolina has passed upon the identical questions and facts involved in this controversy. It has construed both the Constitution of that State and the legislation of the same relating to the bonds in suit, and it has decreed the absolute want of authority in the board of commissioners of the town of Oxford to issue said bonds. Our views concur with the decision of that court in the particulars mentioned; but, independent of that, the construction by that court of the Constitution and laws of that State would, under the circumstances of this case, be followed by us." *Board of Comrs. of Oxford, N. Car., et al. v. Union Bank of Richmond, Va.*, 37 C. C. A. 493, 96 Fed. 293.

Act held invalid by state court as being in violation of constitutional provision; decision binding on federal courts.

1041. (Ill. 1900.) Bonds were issued by a county in Illinois under the assumed authority of an act of the legislature of that State of March 10, 1869, incorporating the St. L. & S. E. Ry. Co., which act the Supreme Court of Illinois had held was void as being in violation of the provision of the Constitution of the State that no private or local law shall embrace more than one subject, which shall be expressed in the title. Held, that such decision was binding on this court, and that the bonds were issued without authority of law and were void in the hands of all holders. No recital can supply the want of legal authority for their execution. *Zane*

v. Hamilton County, Ill., 43 C. C. A. 416, 104 Fed. 63.

On question of what state law controls, federal courts will follow decision of supreme court of state.

1042. (N. Car. 1903.) "We have seen that at the time the bonds were issued the Ordinance of 1808 was in force and gave power to counties embraced by its provisions to take stock in the Northwestern North Carolina Railroad Company and pay for it in county bonds. This was held, in our former opinion, to be taken as the law of North Carolina, because so declared by the Supreme Court of that State when the bonds were issued, and therefore as the law by which the rights of the parties were to be determined." *Wilkes County v. Coler*, 190 U. S. 107, 23 Sup. Ct. Rep. 738, — L. Ed. —.

State decisions followed generally; exceptions to general rule.

1043. (N. Car. 1903.) "The general rule undoubtedly is that we accept the interpretation put by the State Courts upon the State Constitutions and statutes. There are exceptions to the rule, and the case at bar presents one of them. The rule and its exceptions are stated in *Burgess v. Seligman*, 107 U. S. 20, and the many cases by which the rule was sustained are collected in a note on page thirty of the opinion. In that case a statute of Missouri provided that the stockholders of a corporation at its dissolution were liable for its debts. It also provided that no person holding stock as executor, etc., or holding stock as collateral security, should be personally liable, but the persons who pledged the stock should be considered as holding the same, and be liable. The Supreme Court of Missouri held that the exemption of the statute did not extend to persons receiving from the corporation itself stock as collateral security. This court decided to the contrary, and held that it was not bound to

follow the decision of the Supreme Court of the State. The question presented was regarded as one of commercial law and general jurisprudence, and the right to exercise our own judgment was asserted. It was said that State decisions were to be followed when they had become a rule of property, and that 'this is especially true with regard to the law of real estate, and the construction of State Constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued.'" *Stanley County v. Coler*, 190 U. S. 437, 23 Sup. Ct. Rep. 811, — L. Ed. —.

Decision of supreme court of state after bonds issued, holding them invalid.

1044. (N. Car. 1902.) With reference to a decision of the Supreme Court of North Carolina construing a statute of the State under which county bonds had been issued and holding that the bonds were unauthorized, the court say:

"The question now to be re-examined is whether that construction is one to which, as a proposition of law, we can assent; and, if not, are we bound to follow the decision of the Supreme Court of North Carolina?"

"The case of *Commissioners v. Snuggs*, was not a case to which any bondholder was a party. The county commissioners and certain taxpayers of the county were the plaintiffs, and the defendant was the county treasurer, who was the appointee of the county commissioners, had no personal interest to resist the plaintiffs, and represented no bondholders. The bonds had been sold as negotiable securities, and had been over four years on the market, and had been purchased by widely scattered investors. The railroad into Stanley county had been built and was in operation, and for over four years the authorities of the county had recognized the bonds as valid obligations of the county, and had paid the interest. The case was, in effect, a direct attack upon the property of bona fide holders of the bonds, in which they had no hearing. It seems, therefore, to be a case in which it is our duty to examine the question independently, with, however, an earnest disposition to lean towards the conclusion arrived at by the Supreme Court of North Carolina. *Folsom v. Township Ninety-six*, 159 U. S. 611, 627, 16 Sup. Ct. 174, 40 L. Ed. 278; *Burgess v. Seligman*, 107 U. S. 20, 33, 34, 2 Sup. Ct. 10, 27 L. Ed. 359; *Loeb v. Columbia Tp.*, 179 U. S. 472-493, 21 Sup. Ct. 174, 45 L. Ed. 280." Board of Comrs. of Stanley Co. v. Coler, 51 C. C. A. 379, 113 Fed. 705.

Decision of state court after issue of bonds contrary to decisions before issue.

1045. (N. Car. 1902.) "We think that Wilkes county when the bonds in suit were issued was in the same category with Forsyth county, and that the purchasers of the bonds had a right to rely and rest upon the decisions in the cases of *Hill v. Commissioners* (1870), 87 N. C. 367, and *Belo v. Commissioners* (1877), 76 N. C. 489, as to the power conferred by the ordinance of March 9, 1868, and that the different conclusions as to the

power conferred by that ordinance arrived at and declared by a majority of the Supreme Court of North Carolina, long after the date of the issuing of the bonds in suit, cannot destroy the validity of the bonds in the hands of bona fide holders. *Loeb v. Trustees*, 179 U. S. 472, 492, 21 Sup. Ct. 174, 45 L. Ed. 280." Board of Comrs. of Wilkes Co. v. Coler, 51 C. C. A. 399, 113 Fed. 725.

Federal court will hold state law valid if state court so held when bonds were issued.

1046. (Ohio, 1902.) "Up to the time of the issue of these bonds, acts similar to the one under consideration had been upheld by the Supreme Court of Ohio. The fact that the plaintiffs below purchased the bonds after the decision in *Hixson v. Burson* cannot affect its title as a bona fide holder if the bonds were issued under a law held to be valid at the time of the issue. *Gunnison Co. v. E. H. Rollins & Sons*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689." Board of Commissioners v. Gardiner Savings Inst., 55 C. C. A. 614, 119 Fed. 36.

Decisions of state courts followed, when.

1047. (N. Car. 1904.) "We must keep in mind that 'the rights of the holders of county bonds are determined in the Federal courts by the law of the State as it was declared by the State court to be at the time the bonds were made and put on the market.'"

Subsequent decisions not followed, when.

"Certain cases decided by the Supreme Court of North Carolina recently have held that neither this act of the legislature, nor the sections of the Code in which it was incorporated, authorized subscriptions of this character. But the Supreme Court of the United States, and this court in *Wilkes County v. Coler*, 180 U. S. 531, 21 Sup. Ct. 458, 45 L.

Ed. 642; *Stanley County v. Coler*, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126, and *Commissioners v. Coler*, 113 Fed. 705, 51 C. C. A. 379, and *Id.*, 113 Fed. 725, 51 C. C. A. 399, have held that these later decisions do not control the validity of bonds issued prior to their rendition which were valid under previous decisions of North Carolina of force when they were issued. These recent cases above referred to are *Wilkes County v. Call*, 123 N. C. 308, 31 S. E. 481; *Commissioners v. Payne*, 123 N. C. 432, 31 S. E. 711; *Commissioners v. Snuggs*, 121 N. C. 394, 28 S. E. 539. The reason is obvious. The Federal courts sustained the subscriptions made under decisions of the Supreme Court of North Carolina unreversed and in force at their date. It was held that the contracts made under these circumstances could not be invalidated by subsequent decisions. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; *Folsom v. Ninety-six*, 159 U. S. 624, 16 Sup. Ct. 174, 40 L. Ed. 278." *Board of Comrs. of Henderson Co. v. Travelers Ins. Co.*, 63 C. C. A. 467, 128 Fed. 817.

Decisions of supreme court of state made after bonds issued not controlling on federal courts.

1048. (Ill. 1906.) "The decisions referred to are *St. L. A. & T. H. R. R. Co. v. People ex rel.*, 200 Ill. 365, 367, 65 N. E. 715, and *Town of Stites v. Wiggins Ferry Co.*, 97 Ill. App. 157, 159. While the first-mentioned case relates to this issue of bonds, and both cases involve interpretation of the statutory authority, both are subsequent to the issue and sale of the bonds in controversy, and are thus inoperative to govern the rights of the plaintiff in error, in any view under the authorities. *Burgess v. Seligman*, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359, and 10 Notes U. S. Rep. 446; *Folsom v. Ninety-Six*, 159 U. S. 611, 624, 16 Sup. Ct. 174, 40 L. Ed. 278; *Stanley*

Co. v. Coler, 190 U. S. 437, 444, 23 Sup. Ct. 811, 47 L. Ed. 1126. This rule appears to be recognized, to a limited extent, in the brief for defendant in error, but it is contended that the decisions referred to are entitled to great weight, at least, as expressions of the State law. In so far as statutory construction and policy are determinative of the issue, it is of the utmost importance and well settled that State decisions, which are generally controlling, are in any aspect strongly persuasive when like questions are involved in the Federal courts of co-ordinate jurisdiction. But in any view of the decisions cited, they are plainly inapplicable here, under the aforementioned doctrine, which protects the bona fide holder from a defense, opposed to the recitals in the bonds, that the legislative authority was not exercised in conformity with the statutory terms as interpreted by the courts." *Northwestern Savings Bank v. Town of Centreville Station, Ill.*, 74 C. C. A. 275, 143 Fed. 81.

Decisions of state courts; when federal courts will follow.

1049. (N. Car. 1907.) "However, the chief argument made in behalf of plaintiff in error is based on this proposition: A decision by a State court of last resort to the effect that a legislative act was not validly enacted is binding in the Federal court; although such decision is regarded by the Federal court as an erroneous construction of the State Constitution; although such decision was rendered after rights based on the validity of such legislative enactment had accrued; and although such decision had not been foreshadowed or indicated by any previous decision of the State court antedating the accrual of such rights, if there had been no previous State court decision holding or indicating that the legislative act was a validly enacted law."

"Perhaps no rule is better settled,

or more frequently inculcated by the Supreme Court, than that expressions found in opinions of courts which relate to a doctrine of law not necessarily in issue in the case then before the court are not to be regarded as deliberate and binding enunciations of such doctrines. *Carroll v. Carroll's Lessee*, 16 How. 725, 287, 14 L. Ed. 936. It is probable that there is no volume of the Supreme Court Reports in which the idea is not advanced that expressions of opinion not necessary to the determination of the case are to be regarded as dicta. We think it safe to say that every judge in writing opinions occasionally uses expressions which relate to points not necessarily in issue, and which do not represent either his own or his associates' studied and deliberate views. We feel, therefore, constrained to consider, first, if the expressions above quoted state views that are binding upon this court, and, if not, if they be such as we should follow."

"The very foundation of the rule under which the Federal courts independently construe the ordinary provisions of State Constitutions, and refuse to follow erroneous rulings of the State courts, as we understand it, is the justice and propriety of preventing the courts of a State from retroactively impairing the obligation of contracts. See *Rowan v. Runnels*, 5 How. 134, 139, 12 L. Ed. 85, in which the effect of a provision of the Constitution of Mississippi was under consideration, and in which Chief Justice Taney said:

"But we ought not to give them (state decisions) a retroactive effect, and allow them to render invalid con-

tracts entered into with citizens of other states, which in the judgment of this court were lawfully made. If such rule were adopted and the comity due to state decisions pushed to this extent, it is evident that the provision in the Constitution of the United States, which secures to the citizens of another state the right to sue in the courts of the United States, might become useless and nugatory."

"We can conceive of no difference in the effect of erroneous State court rulings in impairing the obligation of contracts, whether such ruling be that a statute was not properly enacted or that the statute is in some other respect violative of the State Constitution. If the rules of comity do not forbid the Federal courts to repudiate the rulings of the State courts in the one class of cases, we cannot perceive why such rules should have such effect in the other class. If the purpose and intent of the provision in the Federal Constitution, which gives to certain citizens of the United States the right to resort to the Federal courts, was to furnish to such litigants a shield against sectional or local prejudice, it seems to follow that this purpose and intent must control as fully and as effectually in one class of cases as in the other. If the Federal Constitution be supreme, we cannot conceive that an erroneous State court decision retroactively impairing rights can properly be allowed to override its intent, no matter what provision of a State Constitution is the subject of such decision." *Board of Comrs. of Hertford County, N. C., v. Tome, et al.*, 82 C. C. A. 215, 153 Fed. 81.

2. When Federal Courts Exercise Independent Judgment.

State decisions not controlling on questions of commercial law.

1050. (Ill. 1866.) "Attention is drawn to the fact that in a recent case not

yet reported, the Supreme Court of the State have held that these bonds are void, even in the hands of an innocent holder, but inasmuch as the power to

issue the bonds was fully conferred by law, the question of their validity in the hands of innocent holders, without notice, is a question of commercial law where the State adjudications, although entitled to great respect, do not furnish the rule of decision in this court. Prior decisions of the State court were in accordance with the decisions of this court, and as those decisions were supposed to be correct expositions of the law of the State at the period when these bonds were issued, the latter adjudications cannot control the judgment in this case." *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556.

State decisions, when not followed.

1051. (Iowa, 1869.) On the question of the power of a city under the laws of Iowa to levy a tax to pay a judgment rendered against such city on its bonds, the Supreme Court of the United States refused to follow the decisions of the Supreme Court of Iowa rendered after the bonds were issued.

"It is set forth in the writ that the judgment was recovered upon bonds issued by the city in 1854. This not being denied by the return, according to the settled law of pleading, is admitted. The act of 1852 and the provisions of the Code were in force at that time, and entered into and formed a part of the contract of the parties. They prescribed one of the remedies to which the bondholders were entitled in the event of default by the city. It has been uniformly held by this court that such remedies are within the protection of the Constitution of the United States, and that any State law which substantially impairs them is as much prohibited by that instrument as legislation which impairs otherwise the obligation of the contract. If the remedy be taken away the contract is in effect annulled. Nothing is left of it, of any value to the party whose rights are thus invaded. This subject was fully considered in *Van Hoffman v. The City of Quincy*. It was there held that laws for the collection of the requisite taxes, existing when the bonds were issued, subsequently repealed, still subsisted for the purposes of the contract, and that a writ of mandamus might issue from the Circuit Court to enforce them. Here the remedy is taken away; not by a subsequent repeal, but by subsequent ju-

dicial decisions: The effect upon the contract is the same as if the provisions of the Code had been repealed. This court construes all contracts brought before it for consideration, and in doing so its action is independent of that of the State courts, which may have exercised their judgment upon the same subject. This is one of the functions we are called upon to perform in this case. The fact that one of the elements in the case is a statute of the State does not affect the legal result. We are of the opinion that under the statutes of Iowa, in force when the contract was made, the relator is entitled to the remedy he asks, and that this right can no more be taken away by subsequent judicial decisions than by subsequent legislation. It is as much within the sphere of our power and duties to protect the contract from the former as from the latter, and we are no more concluded by one than the other. We cannot in any other way give effect to the contract of the parties as we understand it. This contract was entered into in 1854. The earliest of the adjudications to which we have referred was made in 1862. If the construction ultimately given to the statute had preceded the issuing of the bonds, and become the settled law of the State, before that time, the case, as regards this point, would have presented a different aspect." *Butz v. City of Muscatine*, 8 Wall. 575, 19 L. Ed. 490.

State decisions rendered subsequent to issue of the bonds.

1052. (Mich. 1873.) It was urged that the Supreme Court of Michigan had held the statute under consideration invalid, being a statute authorizing aid to railroads.

"With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. We think the dissenting opinion in the one first decided is unanswered. Similar laws have been passed in twenty-one States. In all of them but two, it is believed their validity has been sustained by the highest local courts. It is not easy to resist the force of such a current of reason and authority. The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the

judgment of the courts of the States where the cases arise. It must hear and determine for itself. Here, commercial securities are involved. When the bonds were issued, there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment, neither of the other departments of the government of the State lifted its voice against them. The acquiescence was universal." *Pine Grove Township v. Talcott*, 19 Wall. 666, 22 L. Ed. 227.

Case not involving construction of state statute.

1053. (N. Y. 1875.) The Supreme Court of the United States in this case refused to follow the rule of the New York courts requiring that bona fide holders of negotiable municipal bonds, in an action thereon, were bound to prove the performance of conditions prescribed by the enabling act, as the case did not involve the construction of a State statute. *Town of Venice v. Murdock*, 92 U. S. 494, 23 L. Ed. 583.

Judgment by state court subsequent to issue of bonds.

1054. (Kan. 1878.) "We have not overlooked the opinion by the Supreme Court of the State in *Lewis v. Comrs.*, supra. The judgment in the case was not given until after the bonds were issued, and after the rights of the holders thereof had become fixed. We are, therefore, at liberty to follow our own convictions of the law. To those expressed by the State court we cannot assent. They are not in harmony with many rulings of this court made and repeated through a long series of years, and they are not such as in our opinion would administer substantial justice if applied in this case." *Block v. Comrs.*; *Comrs. v. Block*, 99 U. S. 686, 25 L. Ed. 491.

State decision intervening between judgment of federal circuit court and review in supreme court.

1055. (Ill. 1879.) This court does not feel bound "in any case in which a point is first raised in the courts of the United States, and has been decided in a Circuit Court, to reverse that decision contrary to our own

convictions, in order to conform to a State decision made in the meantime. Such decisions have not 'the character of established precedent declarative of the settled law of the State.'" *Roberts v. Bolles*, 101 U. S. 119, 25 L. Ed. 880.

Irregularity in election; bona fide holder of bonds issued in pursuance of such election; question of validity of bonds one of commercial jurisprudence; state decisions not binding.

1056. (Ill. 1882.) "Our attention has been called to the decision of the Supreme Court of Illinois in the case heretofore mentioned and reported as *Lippincott v. Town of Pana*, 92 Ill. 24, in which it was held that the election relied on in this case as the authority for the issue of the bonds was absolutely void, and the issue of them was, therefore, without authority. Our attention is also called to *People v. Town of Santa Anna*, 67 id. 57, and *People v. Town of Laenna*, id. 65, where similar elections under a like statute were held void. These last two cases were decided before the bonds in this case were issued. They were, however, suits brought to restrain the issue of bonds by the township officers, on account of the irregularities in the election. The rights of bona fide holders could not, therefore, arise, and were not passed on in those cases. But in the case first mentioned the bonds had been issued, and were presumptively in the hands of bona fide holders. Nevertheless, the Supreme Court of Illinois held the bonds to be void in whosoever hands they might be.

"It is insisted that this court is bound to follow this decision of the Supreme Court of Illinois and hold the bonds in question void. We do not so understand our duty. Where the construction of a State Constitution or law has become settled by the decision of the State courts, the courts of the United States will, as a general rule, accept it as evidence of what the local law is. Thus, we may be required to yield against our own judgment on the proposition that, under the charter of the railway company, the election in this case, which was held under the supervision of a moderator chosen by the electors present, was irregular and therefore void. But we are not bound to accept the inference drawn by the Supreme Court of

Illinois, that in consequence of such irregularity in the election the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void in the hands of bona fide holders. This latter proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any other court, however learned or able it may be." *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. Rep. 704, 27 L. Ed. 424.

Powers of municipal organizations; extent and character; rule in absence of state decisions or statutes.

1057. (Tenn. 1884.) "It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of the highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State. But as all, or nearly all the States of the Union, are subdivided into political districts similar to those of the country from which our laws and institutions are in great part derived, having the same general purposes and powers of local government and administration, we feel authorized, in the absence of local State statutes or decisions to the contrary, to interpret their general powers in accordance with the analogy furnished by their common prototypes, varied and modified, of course, by the changed conditions and circumstances which arise from our peculiar form of government, our social state and physical surroundings." *Claiborne County v. Brooks*, 111 U. S. 400, 4 Sup. Ct. Rep. 489, 28 L. Ed. 470.

Decisions of state courts declared after bonds issued.

1058. (Miss. 1884.) The Federal courts are not bound to follow the decisions of the State courts concerning the validity of bonds pronounced after the bonds were issued, in a case between

other parties. "It is a decision upon the very bonds here in suit, pronounced after the controversy arose, and between other parties. It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right under the Constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the State, by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one State, suing in another, the choice of resorting to a Federal tribunal." *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. Rep. 539, 28 L. Ed. 517.

Federal court's independent judgment, in absence of state decisions.

1059. (Ill. 1886.) "If, however, we are in error in our interpretations of the decisions in *Cowgill v. Long*, *Schofield v. Watkins*, and *Keithburg v. Frick*, it results that when the bonds were executed there was no decision of the State court in reference to the power of the legislature to enact the statute of February 28, 1867. In that case, the duty of this court is to determine upon its independent judgment, what was the law of Illinois when the rights of the parties accrued."

"While the courts of the United States accept and apply the construction of a State Constitution or of a local statute, upon which the rights of parties depend, which has been fixed by the course of decisions in the State court, it is the settled doctrine of this court, that rights accruing under one construction will not be lost merely by a change of opinion in the State court; and where such rights have accrued, before the State court has announced its construction, the Federal courts, although leaning to an agreement with the State court, must determine the question upon their own independent judgment." *Anderson v. Santa Anna*, 116 U. S. 356, 6 Sup. Ct. Rep. 413, 29 L. Ed. 633.

To the same effect is *Bolles v. Brim-*

field, 120 U. S. 759, 7 Sup. Ct. Rep. 736.

Decisions of supreme court of state rendered after bonds issued.

1060. (Ill. 1887.) Referring to decisions of the Supreme Court of Illinois, the court say:

"Both of the cases to which we have referred arose after the bonds and coupons now in controversy were issued, and neither of them can control our decision upon the rights of the parties here, any further than as they address themselves to our judgment upon the true construction of the law; and we feel compelled to say that we regard the views expressed in the case of *Martin v. The People* as the most sound and convincing of the two." *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. Rep. 358, 30 L. Ed. 523.

1061. (Mo. 1893.) Decisions of the State courts affecting the rights of holders of municipal bonds, made after the bonds were issued, cannot be deemed controlling on the Federal courts. *Knox County v. Ninth National Bank*, 147 U. S. 91, 13 Sup. Ct. Rep. 267, 37 L. Ed. 93.

State decisions subsequent to purchase of bonds by bona fide holder for value; construction of state statute.

1062. (Miss. 1893.) As against a party who became the owner of bonds before a decision of the Supreme Court of the State, construing a statute of the State, "we do not consider ourselves bound by such decision unless we regard it as intrinsically sound." *Enfield v. Jordan*, 119 U. S. 680 (7 Sup. Ct. Rep. 358, 30 L. Ed. 523); *Bolles v. Brimfield*, 120 U. S. 759 (7 Sup. Ct. Rep. 736, 30 L. Ed. 786). Still, even in such a case, the construction put upon a State statute by the Supreme Court of such State is entitled to our respectful consideration; and we do not hesitate to adopt it as a true construction in the present case, where we have reached the same conclusion upon an independent reading of the statute." *Barnum v. Okolona*, 148 U. S. 393, 13 Sup. Ct. Rep. 638, 37 L. Ed. 495.

Settled course of decisions by state courts.

1063. (S. Car. 1895.) "There not being shown to have been a single deci-

sion of the State court against the constitutionality of the act of 1885 before the plaintiff purchased his bonds, nor any settled course of decision upon the subject, even since his purchase the question of the validity of these bonds must be determined by this court according to its own view of the law of South Carolina." *Folsom v. Ninety-Six*, 159 U. S. 611, 16 Sup. Ct. Rep. 174, 40 L. Ed. 278.

Contract rights; federal courts' independent judgment.

1064. (La. 1901.) "When the jurisdiction of this court is invoked because of the asserted impairment of contract rights, arising from the effect given to subsequent legislation, it is our duty to exercise an independent judgment as to the nature and scope of the contract. Nevertheless, when the contract which, it is alleged, has been impaired, arises from a State statute, as said in *Burgess v. Seligman*, 107 U. S. 34, 2 Sup. Ct. Rep. 10, 27 L. Ed. 365, 'for the sake of harmony and to avoid confusion the Federal courts will lean towards an agreement of views with the State courts, if the question seems to them balanced with doubt.'" *Board of Liquidation of City Debt of New Orleans v. State of Louisiana*, 179 U. S. 622, 21 Sup. Ct. Rep. 263.

Interpretation of state statutes; rule of property.

1065. (Ind. 1894.) "The Federal courts have maintained a rule from their organization that in all cases depending upon a State statute they will adopt and follow the adjudications of the court of last resort in the State in its construction, when that construction is well settled, and without inquiry as to its original soundness. This rule is founded upon respect for property rights, as well as of comity, and had its early expression by Chief Justice Marshall, and has been upheld by an unbroken line of decisions. *Polk's Lessee v. Wendal*, 9 Cranch. 87; *NeSmith v. Sheldon*, 7 How. 812; *Fairfield v. County of Gallatin*, 100 U. S. 47 (25 L. Ed. 455); *Douglass v. County of Pike*, 101 U. S. 677 (25 L. Ed. 968). Therefore, the recent decisions in *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. Rep. 441 (34 L. Ed. 1069), and *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. Rep. 559 (36 L. Ed.

390), cited in behalf of plaintiff in error as decisive, are not applicable. The rights of the holders of these bonds accrued under the previous interpretation by the Indiana courts; and, while these cases in the Supreme Court establish a rule for original construction, they do not govern as to the bonds in suit." *City of Evansville v. Woodbury et al.*, 9 C. C. A. 244, 60 Fed. 718.

Questions of law arising upon recitals in bonds; commercial law.

1066. (S. Dak. 1898.) Questions of law, arising upon recitals contained in bonds, as affecting the rights of bona fide holders, are questions of "commercial law upon which the National courts are bound to exercise their own judgment." *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272.

Construction of state constitutions and statutes; decisions of highest state courts after contract made; not binding on federal courts; rule and exception stated.

1067. (Kan. 1898.) Federal courts are not bound to follow the construction of the Constitution and statutes of a State, given by its highest judicial tribunal, when the decisions announcing such construction were not rendered until after rights were vested under a law unchallenged and without adverse judicial construction when such rights became vested.

In such case a party has a right, "under the Constitution and laws of the United States, to have his contract interpreted and his rights enforced in a court of the United States, and a fortiori the right to the independent judgment of that court upon the legal questions his case presents. This case falls within one of the recognized exceptions to the general rule which the defendant invokes. That exception is that decisions of the State courts which affect the validity of contracts between citizens of different States which were made or under which rights were acquired, before there was judicial construction of the Constitution or statute which seemed to authorize the contracts, are not obligatory upon the courts of the United States." *Speer v. Board of County Comrs. of Kearney County, Kan.*, 32 C. C. A. 101, 88 Fed. 749.

Decision of state court rendered after bonds issued.

1068. (Mich. 1890.) Referring to a decision of the Supreme Court of Michigan relied upon as to the validity of the bonds involved in this suit, the court say:

"Even if the exact point were in judgment before the Supreme Court of Michigan, we should not be concluded by its decision in a case like this. The bonds were issued and bought by those through whom the complainant claims in 1872, and this decision was not rendered until 1884. In such a question the courts of the United States exercise an independent judgment. *Pleasant Township v. Aetna Life Ins. Co.*, 138 U. S. 67, 11 Sup. Ct. Rep. 215, 34 L. Ed. 864; *Folsom v. Ninety-Six Township*, 159 U. S. 611, 16 Sup. Ct. Rep. 174, 40 L. Ed. 278; *Pana v. Bowler*, 107 U. S. 541, 2 Sup. Ct. Rep. 704, 27 L. Ed. 424; *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36, 22 C. C. A. 334, 76 Fed. 296. It certainly appears from these records that a majority of the voters in attendance at the township meetings called for the purpose approved the issue of the bonds sued upon." *Rondot v. Rogers Township*, 39 C. C. A. 462, 99 Fed. 202.

Construction of state constitutions and statutes; questions of general jurisprudence and commercial law; contract rights; rights of citizens of other states; rule and exceptions stated.

1069. (Nebr. 1900.) Though it is a rule that "the National courts uniformly follow the construction of the Constitution and statutes of a State given by its highest judicial tribunal, in all cases that involve no question of general or commercial law, and no question of right under the Constitution and laws of the Nation," "There are, however, two exceptions to this rule as vital and as clearly established as the rule itself. The first is that decisions of State courts which affect the validity of contracts between citizens of different States, which were made, or under which rights were acquired, before there was a judicial construction of the Constitution or statute which seemed to authorize the contracts, are not obligatory upon the courts of the United States."

"The other exception is that conceding that the action of a municipal

or quasi-municipal body was illegal, as held by a State court, still the question whether or not the illegal action of such a body, in the exercise of a power granted to it, constitutes any defense to bonds issued or contracts made pursuant to such action, and held by a bona fide purchaser, is a question of general jurisprudence, which it would be a dereliction of duty for a Federal court to decline to consider and determine for itself." *Clapp v. Otoe County, Neb.*, 45 C. C. A. 579, 104 Fed. 473.

Federal court; when will exercise independent judgment.

3. Change in Rules of Decision by State Courts; Contract Rights Protected by Federal Courts.

State decisions in force at time of contract.

1071. (Iowa, 1863.) "It is urged that all these decisions have been overruled by the Supreme Court of the State, in the latter case of the State of Iowa, ex rel. v. The County of Wapello, and it is insisted that in cases involving the construction of a State law or Constitution, this court is bound to follow the latest adjudication of the highest court of the State. *Lefingwell v. Warren* is relied upon as authority for the proposition. In that case this court said it would follow 'The latest settled adjudications.' Whether the judgment in question can, under the circumstances, be deemed to come within that category it is not now necessary to determine. It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen States of the Union. Many of the cases in the other States are marked by the profoundest legal ability. The late case in Iowa, and two other cases of a kindred character in another State, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety. However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. 'The sound and true rule is that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government and administered in its courts of justice, its validity and obligation can-

1070. (Iowa, 1902.) On the question whether, in this case, the city of Ottumwa would violate the constitutional limitation on municipal indebtedness by a proposed issue of bonds the Federal court refused to adopt and follow the rule of the Supreme Court of Iowa, on the ground that it was the duty of the Federal court to exercise an independent judgment in the application of statutory or constitutional provisions to a particular contract or transaction. Held in this case that the proposed issue did violate Iowa Constitution. *City of Ottumwa v. City Water Supply Co.*, 56 C. C. A. 219, 419 Fed. 315.

not be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.' The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. This rule embraces this case." *Gelpcke et al. v. The City of Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Havemeyer v. Iowa City*, 3 Wall. 294, 18 L. Ed. 38; *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350; *Lee County v. Rogers*, 7 Wall. 181, 19 L. Ed. 16.

Following decisions of state courts; change in decisions state courts after bonds issued.

1072. (Iowa, 1863.) Noticing the claims asserted by the city as grounds of defense to the bonds involved in this suit, the court say: "All these objections have been fully considered and repeatedly overruled by the Supreme Court of Iowa." (Citing a number of cases decided in 1853 to 1859.)

"The bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy. They exhaust the argument upon the subject. We could add nothing to what they contain. We shall be governed by them, unless there be something which takes the case out of the established rule of this court upon that subject. It is urged that all the decisions have been overruled by the Su-

preme Court of the State, in the later case of the State of Iowa *ex rel. v. The County of Wapello*, and it is insisted that in cases involving the construction of a State law or Constitution, this court is bound to follow the latest adjudication of the highest court of the State. *Leffingwell v. Warren* is relied upon as authority for the proposition. In that case this court said it would follow 'the latest settled adjudications.' Whether the judgment in question can, under the circumstances, be deemed to come within that category, it is not now necessary to determine. It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur."

"However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. 'The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law. The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case."

"We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and Constitutions of their own States. It is the settled rule of this court in such cases, to follow the decisions of the State courts. But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law because a State tribunal has erected the altar and decreed the sacrifice." *Gelpcke v. City of Dubuque*, 1 Wall. 175, 17 L. Ed. 520.

Change of decision subsequent to contract.

1073. (Iowa, 1865.) "If the bonds in suit had been executed since the last decision in Iowa, they would be

controlled by it; but the change in judicial decision cannot be allowed to render invalid contracts which, when made, were held to be lawful. The courts of Iowa, having, when these bonds were issued, construed their Constitution and laws so as to give them force and validity, cannot, by a subsequent and contrary construction, destroy them. *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177.

Changed rule of decision by state court.

1074. (Wis. 1869.) "It is urged also that the Supreme Court of Wisconsin has held that the act of the legislature conferring authority upon the city to lend its credit, and issue the bonds in question, was in violation of the provision of the Constitution above referred to. But, at the time this loan was made, and these bonds were issued, the decisions of the court of the State favored the validity of the law. The last decision cannot, therefore, be followed." *The City (of Kenosha) v. Lamson*, 9 Wall. 477, 19 L. Ed. 725, 730.

Changed judicial construction.

1075. (Mo. 1879.) "As a rule, we treat the construction which the highest court of a State has given a statute of the State as part of the statute, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected."

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment. So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper. We recognize fully, not only

the right of a State court, but its duty to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and ordinarily we will follow them, except so far as they affect rights vested before the change was made." *Douglass v. County of Pike*, 101 U. S. 677, 25 L. Ed. 968.

Changed rule of decisions by state courts.

1076. (N. Y. 1880.) In this case the court declined to follow the latest decisions of the State Supreme Court, holding a curative statute to be unconstitutional for the reason, that at the time the bonds in suit were issued the decisions of the State Supreme Court held such acts to be valid. *Thompson v. Perrine*, 103 U. S. 806, 26 L. Ed. 612.

Rule of decision of state court when contract made.

1077. (Mich. 1881.) Following the former decisions of this court it was held in this case, "To be the duty of the Federal courts, in all cases within their jurisdiction, depending upon local law, to administer that law, so far as it affects contract obligations and rights, as it was judicially declared to be by the highest court of the State at the time such obligations were incurred or such rights accrued. And this doctrine is no longer open to question in this court. It has been recognized for more than a quarter of a century as an established exception to the general rule that the Federal courts will accept or adopt the construction which the State courts give to their own Constitution and laws." *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. Ed. 1008; *New Buffalo v. Iron Co.*, 105 U. S. 73, 26 L. Ed. 1024.

Changed rule of decision of the supreme court of a state.

1078. (Ill. 1886.) "If, according to the law of Illinois, as declared by its highest court at the time the bonds in suit were issued, the act of February 28, 1867, was a valid exercise of legislative power, the rights of the purchasers or holders, could not be affected merely by subsequent change of decision. For it is the long established doctrine of this court—from which, as said recently in *Green County v. Conness*, 100 U. S. 105, we are not disposed to swerve—that where the liability of a municipal corporation upon negotiable securities depends upon a

local statute, the rights of the parties are to be determined according to the law as declared by the State courts at the time such securities were issued." *Anderson v. Santa Anna*, 116 U. S. 356, 6 Sup. Ct. Rep. 413, 29 L. Ed. 633.

Changed rule of decision of state court.

1079. (Mo. 1889.) "But this court declined to reconsider its former decisions to the prejudice of bona fide holders of bonds issued prior to the change of decision in the State court. The bonds, the coupons of which are here in suit, were all issued in 1871, at which time the highest court of Missouri held that the above constitutional provision, as to municipal subscriptions or the loaning of municipal credit to corporations without a previous vote of the people, was intended (to use the language of *County of Ralls v. Douglass*), 'as a limitation on future legislation only, and did not operate to repeal enabling acts in existence when the Constitution took effect.'" *Scotland County v. Hill*, 132 U. S. 107, 10 Sup. Ct. Rep. 26, 33 L. Ed. 261.

Rule of decision of state court.

1080. (Tex. 1899.) "In determining what the laws of the several States are, which will be regarded as rules of decision, we are bound to look, not only at their Constitutions and statutes, but at the decisions of their highest courts giving construction to them."

"If there be any inconsistency in the opinions of these courts, the general rule is that we follow the latest settled adjudications in preference to the earlier ones."

"An exception has been admitted to this rule, where, upon the faith of State decisions affirming the validity of contracts made or bonds issued under a certain statute, other contracts have been made or bonds issued under the same statute before the prior cases were overruled. Such contracts and bonds have been held to be valid, upon the principle that the holders upon purchasing such bonds and the parties to such contracts were entitled to rely upon the prior decisions as settling the law of the State. To have held otherwise would enable the State to set a trap for its creditors by inducing them to subscribe to bonds and then withdrawing their own security." *Wade v. Travis County*, 174 U. S. 499, 19 Sup. Ct. Rep. 715, 43 L. Ed. 1060.

CHAPTER XVII.

RES ADJUDICATA; LIS PENDENS; INJUNCTIONS BY STATE COURTS.

To what extent prior decisions of the courts, in causes in which municipal bonds have been in any way involved, may affect the rights of purchasers or holders of the securities, and to what extent the doctrine of *lis pendens* applies to such securities and dealers therein, are questions of interest and importance to the bond buyer and bond lawyer.

The cases involving these matters which have been decided by the Supreme Court and the Circuit Courts of Appeals of the United States are cited and noted in this chapter, with the exception of some that appear in part C of chapter XII on the subject of *mandamus* proceedings.

Jurisdiction of federal courts; not affected by state legislation; injunction by state courts; process of federal courts not affected thereby; discussion; impairing obligation of contract by removal of taxing power.

1081. (Iowa, 1867.) A State court cannot enjoin or interfere with process of a Federal court.

"Where a State has authorized a municipal corporation to contract and to exercise the local power of taxation to the extent necessary to meet the engagement, the power thus given cannot be withdrawn until the contract is satisfied."

"Authority of the Circuit Courts to issue process of any kind which is necessary to the exercise of jurisdiction and agreeable to the principles and usages of law, is beyond question, and the power so conferred cannot be controlled either by the process of the State courts or by any act of a State legislature."

"Repeated decisions of this court have also determined that State laws, whether general or enacted for the par-

ticular case, cannot in any manner limit or affect the operation of the process or proceedings in the Federal courts."

The Constitution itself becomes a mockery if the State legislatures may at will annul the judgments of the Federal courts and the Nation is deprived of the means of enforcing its own laws by the instrumentality of its own tribunals.

"State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the National courts."

"Viewed in any light, therefore, it is obvious that the injunction of a State court is inoperative to control, or in any manner to affect the process or proceedings of a Circuit Court, not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, Circuit Courts are wholly independent of the State tribunals." *Riggs v. Johnson County*, 6 Wall. 166, L. Ed.

Proceedings in federal courts not affected by injunction by state courts.

1082. (Ill. 1867.) "State courts cannot enjoin the process or proceedings in the Circuit Courts, not on account of any paramount jurisdiction in the latter, but because they are entirely independent in their sphere of action." *Weber v. Lee County*, 6 Wall. 210, L. Ed.

Res adjudicata; same parties and title.

1083. (Wis. 1868.) "On the 9th of January, 1861, the appellee recovered a judgment at law against the appellant upon another portion of these securities—though not the same with those in question in this case. The parties were identical, and the title involved was the same. All the objections taken in this case might have been taken in that. The judgment of the court could have been invoked upon each of them, and if it were adverse to the appellant, he might have brought the decision here by a writ of error for review. The court had full jurisdiction over the parties and the subject. Under such circumstances, a judgment is conclusive, not only as to the res of that case, but as to all further litigation between same parties touching the same subject-matter, though the res itself may be different."

"A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction. The judgment at law established conclusively the original validity of the securities described in the bill, and the liability of the town to pay them. Nothing is disclosed in the case which affects this condition of things." *Beloit v. Morgan*, 7 Wall. 619, 19 L. Ed. 203, 205.

Pendency of litigation.

1084. (Ky. 1871.) Purchasers in the open market of negotiable municipal bonds are not affected by the pendency of litigation concerning them. *City of Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809.

Former judgment as estoppel.

1085. (Iowa, 1876.) In this case, an action on bonds of Sac county and interest coupons, the county pleaded and relied upon the estoppel of a former

judgment rendered in its favor, in an action brought by one Smith upon certain earlier maturing coupons from the same bonds accompanied with proof, that Cromwell the plaintiff here was at the time the owner of the coupons in that action, and that the action was prosecuted for his sole use and benefit. Held, that on the facts appearing, such former judgment did not operate as an estoppel. The rule of law relating to res adjudicata discussed at considerable length. *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195.

Pendency of suit; affecting bonds.

1086. (Ill. 1877.) "Was the commencement and pendency of the suit for having the proceedings of the supervisors declared void, and preventing the issue of the bonds, such notice to all persons of their invalidity, as to defeat the title of a purchaser for value before maturity, having no actual notice of the suit, or of the objection to the bonds?"

"It is a general rule that all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, on their peril, purchase the same from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way. This exception was suggested by Chancellor Kent, in one of the leading cases on the subject in this country, and has been confirmed by many subsequent decisions."

A number of cases noticed and commented upon.

"Whilst the doctrine of constructive notice arising from lis pendens, though often severe in its application, is, on the whole, a wholesome and necessary one, and founded on principles affecting the authoritative administration of justice; the exception to its application is demanded by other considerations equally important, as affecting the free operations of commerce, and that confidence in the instruments by which it is carried on, which is so necessary in a business community." *County of Warren v. Marcy*, 97 U. S. 96, 24 L. Ed. 977.

Nonresident bondholders not bound by judgment of invalidity of bonds rendered in action against other bondholders; constructive service ineffective.

1087. (Ill. 1878.) "The fifth plea is radically defective. The suit commenced and determined in the Circuit Court of Lee county was a proceeding wholly in personam, against the holders and owners of bonds and coupons which had been issued in the name of the town, and delivered to the railroad company. Upon principle and authority, no decree therein rendered could bind any one not personally served with process, or who did not appear. It could not affect the rights of nonresident holders of bonds and coupons, proceeded against by constructive service. Such service, as to them, was ineffective for any purpose whatever." *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416.

1088. (N. Y. 1878.) The doctrine of lis pendens has no application to commercial securities. *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404.

Judgment for municipality in state court; held a bar to subsequent action on same coupons in federal court by transferee.

1089. (Kan. 1878.) A holder of county bonds on which interest was in default applied to a State court for a writ of mandamus to compel the county commissioners to provide for the payment of the coupons representing such interest. The validity of the bonds was denied by the county and judgment was rendered in favor of the county. Thereafter the interest coupons involved in that proceeding were transferred to another person to be collected for the benefit of the transferrer.

In an action by the transferee to recover on such coupons, held, that the judgment in the State court was a bar to the latter suit. *Block v. Comrs.*; *Comrs. v. Block*, 99 U. S. 686, 25 L. Ed. 491.

Injunction proceedings not constructive notice to purchasers.

1090. (Mo. 1879.) "The fourth assignment is based on the fact that the bonds were issued pending and in violation of an injunction of the Circuit Court of the county of Cass, directed to the justices of the County Court; and it is argued that this was notice

to all the world of the objections to the regularity and validity of the bonds."

"The question of lis pendens as applicable to negotiable securities was fully considered by us in the case of *County of Warren v. Marcy* (97 U. S. 107), and we there held that a bona fide purchaser before maturity is not affected with constructive notice of a suit respecting such paper. That decision applies to the present case, and the objection cannot prevail to invalidate the plaintiff's title." *County of Cass v. Gillett*, 100 U. S. 585, 25 L. Ed. 585.

Dismissal of cause without prejudice not a bar; second suit on different facts.

1091. (Ala. 1880.) "The decree was, therefore, reversed and the bill dismissed but without prejudice,—a condition which prevented the adjudication from operating as a bar to the same claim, if the complainants could in another suit obviate the defects of the existing bill. In the present suit, they have obviated these defects. They allege and prove that the harbor board had disposed of all the bonds it had received before the passage of the act of April 19, 1873, restricting the number to be issued, and that it had turned over to the officials of the county neither bonds nor proceeds to meet the demand of the complainants. The two suits, though seeking the same relief, rest upon a different state of facts, and the adjudication in the one constitutes, therefore, no bar to a recovery in the other." *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238.

Injunction against negotiation of bonds not binding on purchasers without notice.

1092. (N. Y. 1880.) "A temporary injunction was obtained on the 24th of June, 1869, restraining the respondents and each of them from using, loaning or selling the bonds and from executing any other bond based upon the consents given by the taxpayers. But that injunction was vacated and set aside on 27th July, 1869. A final decree was rendered in 1872 by which the bonds were declared to be null and void, and they as well as the certificates of stock exchanged therefor directed to be delivered up, by the re-

spective parties, and cancelled. The general ground upon which the decree rested was that the provisions of the act under which they were issued were not complied with. From that judgment no writ of error or appeal seems to have been prosecuted. We have already seen that the entire issue of bonds was delivered to the railroad before the commencement of that action, that is, in May, 1869; and that after the dissolution of the injunction, to wit, in September and November, 1869, a large portion of the bonds had found their way into the hands of others who purchased them for value and without any notice of the pendency of the suit in the Supreme Court. There is an insuperable difficulty in the way of plaintiff in error using the judgment in that case to defeat the present action. The bonds were negotiable securities, which had passed from the town before the action in the Supreme Court of the State was commenced. Those who purchased them, in the market, pending that litigation, or after it terminated without notice of the suit, and in good faith, for value, could not be affected by the final decree. Had the complainants caused them to be surrendered to the custody of the court, pending the suit, they could have been cancelled in pursuance of the directions contained in the final decree. But the actual custody of the railroad company was never disturbed, nor sought to be disturbed. The knowledge by its officers of the objects of the action, or of the terms of the final decree, could not affect a bona fide purchaser for value who had no such knowledge." *Thompson v. Perrine*, 103 U. S. 806, 26 L. Ed. 612.

Reversal of judgment of county court directing issuance of bonds; effect on bonds issued before reversal.

1093. (N. Y. 1881.) A county judge rendered a judgment appointing commissioners to execute bonds on behalf of the town of Lansing and ordered the bonds to be issued. The Supreme Court of the State reversed and annulled the judgment and order of the county judge, but before such reversal the bonds were issued and put upon the market.

"As between the railroad company and the town, the judgment of the Supreme Court reversing and annulling the order of the county judge invali-

dated the bonds. If the bonds had not been delivered before, they could not have been afterwards. The judgment of reversal was equivalent between these parties, to a refusal by the county judge to make the original order." *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866.

Decree of state court holding bonds invalid; not binding on nonresident bondholder.

1094. (Ill. 1882.) "The next contention of the plaintiff in error is that the decree of the Circuit Court of Christian county, Illinois, by which the bonds in question were declared void, is binding on the plaintiffs in this case, and is a bar to the action upon the coupons sued on. The plaintiffs in this case are citizens of the State of Maine. It is sought to bind them by a decree rendered in a proceeding purely in personam in a case in which they were not named as parties, when there was no personal service upon or appearance by them, and when the only pretense of notice to them of the pendency of the suit was a publication addressed to the 'unknown holders and owners of bonds and coupons issued by the town of Pana.'"

"It is contended that, under the statutes of Illinois, parties may be thus brought in and a valid personal decree rendered against them. Whatever may be the effect of such a decree upon citizens of the State of Illinois, this court has held that, as to non-residents, it is absolutely void."

"It is insisted by counsel for the plaintiff in error that the decree of the State court recites the fact that the persons made defendants under the designation of 'the unknown holders and owners of bonds and coupons issued by the town of Pana,' which includes the defendants in error, appeared in that court, and that they are, therefore, concluded by the decree in the case. There is no pretense that there was any appearance in fact of the parties referred to. It is sought to conclude them by a loose expression in the decree, which, in our opinion, was clearly not intended to recite their appearance, and is not fairly open to such a construction." *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. Rep 704, 27 L. Ed. 424.

Pendency of suit to enjoin issue of bonds.

1095. (Miss. 1884.) The pendency of a suit to enjoin the issue of bonds will not affect the title of a bona fide holder of such bonds. "The defendant in error was no party to that suit, and the record of the judgment is therefore no estoppel. The bonds were negotiable, and there was, therefore, no constructive notice of any fraud or illegality, by virtue of the doctrine of *lis pendens*. County of Warren v. Marcy, 97 U. S. 96. It is not alleged in the plea that the defendant in error had actual notice of the litigation, or of the grounds on which it proceeded, or that any injunction was served upon the board of supervisors; and, if he had, that notice would have been merely of the question of law, of which, as we have seen, he is bound to take notice, at all events, and which is now for adjudication in this case." Carroll County v. Smith, 111 U. S. 556, 4 Sup. Ct. Rep. 539, 28 L. Ed. 517.

Injunction by taxpayers.

1096. (Mo. 1884.) A decree in a suit brought by the taxpayers of a county to enjoin the issuance of bonds is binding upon those who buy the bonds from the litigating parties with actual notice of the suit. Scotland County v. Hill, 112 U. S. 183, 5 Sup. Ct. Rep. 93, 26 L. Ed. 692.

Judgment on other coupons.

1097. (Ill. 1887.) "The coupons on which said former judgment was rendered were different coupons from those involved in the present suit. This suit, therefore, was brought upon a different cause of action from that upon which the former suit was brought. Whether the same issues were raised and passed upon in that suit which are raised in this, the stipulation does not inform us. The question is too general in its terms to admit of a precise answer. If the defendant sought to set up in this suit some new defense, which was not made in the former one, and not necessarily decided therein, it should have been allowed to do so, under the ruling of this court in *Cromwell v. Sac County*, 94 U. S. 351, 354."

Former judgment concerning validity of a bond not due.

"For the purpose in hand, it is sufficient to remark that the bond held

by Post was not matured, and will not mature till the year 1891, and, therefore, a decree against Post has no binding effect on a subsequent holder of the bond purchasing the same before maturity and without notice. To have made the decree effectual against the bond itself, Post should have been required to produce it in court, in order that it might have been cancelled. If he parted with the bond pending suit, it would make no difference. The subject of notice by *lis pendens* in relation to negotiable securities was considered by this court in the cases of *Warren County v. Marcy*, 97 U. S. 96, and *Carroll County v. Smith*, 111 U. S. 556, and needs no further discussion. The general rule announced in those cases is, that the pendency of a suit relating to the validity of negotiable paper not yet due is not constructive notice to subsequent holders thereof before maturity. This general rule cannot be changed by State laws or decisions so as to affect the rights of persons not residing and not being within the State, any more than publication of suit can be made constructive service of process upon such persons. Rights to real property and personal chattels within the jurisdiction of the court, and subject to its power, may be affected by *lis pendens*, but not those acquired by the transfer of negotiable securities, or by the sale of articles in market overt in the usual course of trade." *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. Rep. 358, 30 L. Ed. 523.

Decree of validity by consent of mayor of town; not a ratification; not res judicata; bonds held invalid.

1098. (Tenn. 1888.) A consent decree of the Court of Chancery, entered in an action brought by taxpayers of a town to enjoin the collection of certain bonds on the ground of their invalidity (the bonds having been issued to aid a railroad company), and which decree embodied an agreement signed by the mayor of the town and an officer of the railroad company, can give no validity to the bonds.

"The act of the mayor, in signing that agreement, could give no validity to the bonds, if they had none at the time the agreement was made. The want of authority to issue them extended to a want of authority to de-

clare them valid. The mayor had no such authority. The decree of the court was based solely upon the declaration of the mayor, in the agreement, that the bonds were valid; and that declaration was of no more effect than the declaration of the mayor in the bill in chancery, that the bonds were invalid. The adjudication in the decree cannot, under the circumstances, be set up as a judicial determination of the validity of the bonds. (*Russell v. Place*, 94 U. S. 606; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 125.) This was not the case of a submission to the court of a question for its decision on the merits, but it was a consent in advance to a particular decision, by a person who had no right to bind the town by such a consent, because it gave life to invalid bonds; and the authorities of the town had no more power to do so than they had to issue the bonds originally." *Nashville, etc., Railway Co. v. United States* (113 U. S. 261), distinguished. *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. Rep. 1101, 32 L. Ed. 77.

Res adjudicata; judgment on different coupons, but from same bonds.

1099. (*Iowa*, 1892.) The rule announced in *Cromwell v. Sac County*, 94 U. S. 351, followed and applied.

"By the rule laid down in *Cromwell v. County of Sac*, the judgment in the suit at Des Moines is conclusive in this case only as to the matters actually litigated and determined. What were they? The defense pleaded was this: That at the time the bonds were issued the indebtedness exceeded five per cent., and the bonds were therefore void; that the district received no consideration; and that the plaintiff was not a bona fide holder. The judgment entry shows that it appeared from the evidence that the indebtedness at the time the bonds were issued exceeded the constitutional limitation of five per cent.; but that it was adjudged that the recitals in the bonds estopped the defendant from showing this fact against the plaintiff. In other words, that which was determined was the effect of the recitals. But this case does not turn upon that question at all, and nothing was determined here antagonistic to the adjudication there. An additional fact, that of notice from the

amount of the bonds purchased, was proved.

"The effect of recitals in municipal bonds is like that given to words of negotiability in a promissory note. They simply relieve the paper in the hands of a bona fide holder from the burden of defenses other than the lack of power, growing out of the original issue of the paper, and available as against the immediate payee. Suppose two negotiable promissory notes, issued at the same time, and as a part of the same transaction. In a suit on the first, brought by a purchaser before maturity, the maker proves facts constituting a defense as against the payee, but fails to bring home notice of these facts to the holder before his purchase; the judgment must go in favor of the holder, for the words of negotiability in the note preclude the maker from such a defense as against him. In a suit on the second of such notes may not the maker couple proof of notice to the holder, with that of the original invalidity of the note, and thus establish a complete defense against the holder? Is he precluded by the first judgment, and his failure in that to prove notice to the holder? That is precisely this case. In the suit at Des Moines no notice to the holder was shown. The recitals cut off the defense pleaded, of original invalidity. In this action notice is proved, and an additional fact is put into the case, which makes a new question. The effect of recitals is one thing; that of recitals coupled with notice is another. The one question was litigated and determined in the Des Moines suit; the other is presented here. Surely an adjudication as to the effect of one fact alone does not preclude in the second suit an inquiry and determination as to the effect of that fact in conjunction with others." *Nesbit v. Riverside Independent District*, 144 U. S. 610, 12 Sup. Ct. Rep. 746, 36 L. Ed. 562.

Collusive judgment.

1100. (*N. Y.* 1895.) A judgment rendered in a collusive suit between the holders of coupons and the town issuing the bonds cannot be considered as an adjudication binding the bondholders in any subsequent controversy between them and the town. *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. Rep. 954, 39 L. Ed. 996.

Former judgment in state court.

1101. (La. 1894.) On application for a mandamus in a Federal court to compel the payment of a judgment it was held that the questions which had been decided by the State courts in a similar proceeding between the same parties were res adjudicata. *Police Jury of Jefferson v. United States ex rel. Fisk*, 8 C. C. A. 607, 60 Fed. 249.

Former action between same parties or privies on same cause of action.

1102. (Colo. 1897.) "The settled rule upon this subject was so clearly stated in the leading case of *Cromwell v. County of Sac*, 94 U. S. 351, 352, that it has been universally followed in the courts of the United States. It is that in an action between the same parties, or those in privity with them, upon the same claim or demand, a judgment upon the merits is conclusive, not only as to every matter offered, but as to every admissible matter which might have been offered to sustain or defeat the claim or demand. But in a case in which the second action is upon a different claim or demand, the prior judgment is an estoppel as to those matters in issue or points of controversy upon the determination of which the finding or verdict was rendered."

Former judgment obtained by fraud or collusion.

"Was the fact, pleaded in the answer, that the judgment in favor of Parks was obtained by fraud and collusion, an avoidance of that judgment, or a defense to this action? No fraud was alleged which deprived the board of notice of the suit and of ample time to answer the petition of Parks therein before the judgment was rendered. A direct suit may undoubtedly be maintained in a proper case, to set aside a judgment for fraud in procuring it. *Gaines v. Fuentes*, 92 U. S. 10, 21; *U. S. v. Norsch*, 42 Fed. 417; 1 Black Judgm., § 321, and cases cited. But until such a suit is brought, and until such a decree of avoidance is rendered, the judgment of a State court which had jurisdiction of the subject-matter and of the parties is conclusive upon the merits of the controversies determined by that judgment between the parties and their privies in every court of the United States, and such a judgment cannot

be collaterally impeached for fraud or collusion."

These rules discussed and a large number of cases cited and reviewed. *Board of Comrs. of Lake County v. Platt*, 25 C. C. A. 87, 79 Fed. 567.

Decision of validity of act by supreme court of state not conclusive on that or other courts on subsequent trial on different constitutional questions.

1103. (N. Car. 1899.) A decision by the Supreme Court of a State that a State statute does not violate a particular provision of the Constitution of the State, then considered, is not binding on that court, or on other courts, when the question of the validity of the same act is again put in issue on another constitutional ground.

Railroad-aid subscription; mandamus by company to compel completion; consent judgment pursuant to compromise; bonds in satisfaction held invalid, notwithstanding judgment.

The statute relied upon as authority for the issuance by a town of its bonds in aid of a railroad company, being unconstitutional and void, a compromise judgment entered in a case pending between the town and the railroad company by consent and agreement of the company and the board of commissioners of the town, pursuant to which bonds were issued to the company in an amount less than had been authorized by the electors of the town, cannot give validity to such bonds as the question of the validity of the bonds and the legislation was not in issue, and if that legislation was invalid when the compromise was entered into, the rendition of the judgment based thereon did not make it valid. If the town had not the power to issue bonds, the consent of its board of commissioners to the compromise agreement would not cure the defect. *Board of Comrs. of Oxford, N. Car., et al. v. Union Bank of Richmond, Va.*, 37 C. C. A. 493, 96 Fed. 293.

Res adjudicata, discussion of.

1104. (Colo. 1899.) This was an action on coupons numbers 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, which were cut from ten bonds issued by Lake county. John Sutliff, father of plaintiff below in this case had prosecuted a suit on coupons numbers

1 to 8, inclusive, cut from the same bonds (*Sutliff v. Comrs.*, 147 U. S. 230, 14 Sup. Ct. Rep. 318), in which suit it was held that the bonds and coupons were void, because they were issued when the debt of the county exceeded the constitutional limitation on such debt. Subsequently John Sutliff gave the bonds and coupons now in suit to his son, plaintiff below. The judgment in the former suit was pleaded in this case as *res adjudicata*. The court on this point say:

"In the discussion of this position it will be conceded that James R. Sutliff, the defendant in error is a privy of John Sutliff, the plaintiff in the former suit, and that the question here is the same that would have arisen if this action had been between the parties to the former judgment. There are two grounds on which an earlier judgment in an action between the same parties may constitute a conclusive estoppel respecting the issues in a subsequent suit. The first ground is that the latter suit is founded upon the same causes of action upon which the former action was based. In a case where this is the fact, the former judgment is conclusive in the subsequent litigation, not only of every issue which was raised and determined, but also of every question which might have been presented by either party and might have been determined by the court in that suit. The second ground is that the subsequent action is founded on different causes of action, but that the issues which it presents were actually raised, litigated, and determined in the earlier suit. In a case in which the second action is upon different causes of action from those involved in the first, the former judgment, though between the same parties, operates as an estoppel only as to the points and questions actually litigated and determined, and it leaves the parties free to contest and try *de novo* every issue and controversy which might have been but which was not in fact, litigated and decided in the earlier action. *Cromwell v. Sac County*, 94 U. S. 351, 352; *Nesbit v. Riverside Independent District*, 144 U. S. 610, 618, 12 Sup. Ct. Rep. 746; *Comrs. v. Platt*, 49 U. S. App. 216, 223, 25 C. C. A. 87, 91, and 79 Fed. 567, 571. It will be noticed that pleading and proof that the earlier suit was upon the same causes

of action as the later is sufficient to establish the estoppel upon the first ground, but that where the second suit is upon different causes of action it is indispensable to the estoppel that it should appear that the questions in issue or points of controversy in the second action were actually raised, litigated and determined in the first."

"It is now claimed that the causes of action upon these coupons were the same as those involved in the former action, and that, if they were different, the questions involved in this action were actually raised and litigated in the earlier suit. Neither position is tenable. The causes of action upon coupons numbered 9 to 20, inclusive, which are involved in this action, are not the same causes of action as those upon coupons numbered 1 to 8, which were the subject-matter of the earlier suit. Each matured coupon is a separate promise, and it gives rise to a separate and distinct cause of action. There was therefore no estoppel, because the causes of action in the two suits were the same. *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610, 619, 12 Sup. Ct. Rep. 746. The causes of action in the two suits were different."

"Were the issues or points in controversy in this action actually raised and litigated in the former suit? This question was never presented to the trial court by plea, proof, or request for an instruction to the jury, and no exception was ever taken, and no error was ever assigned, to any ruling upon it. It is therefore not here for our consideration. In an action at law, this is a court for the correction of the errors of the court below exclusively. Questions which were not presented to, or decided by, that court are not open for review here, because the trial court cannot be guilty of error in a ruling that it has never made upon an issue to which its attention was never called. *Railway Co. v. Henson*, 19 U. S. App. 169, 171, 7 C. C. A. 349, 351, and 58 Fed. 530, 532; *Philip Schneider Brewing Co. v. American Ice Mach. Co.*, 40 U. S. App. 382, 403, 23 C. C. A. 89, 100, and 77 Fed. 138, 149; *Manufacturing Co. v. Joyce*, 8 U. S. App. 309, 311, 4 C. C. A. 368, 370, and 54 Fed. 332, 333. If it should be thought that the exception to the peremptory charge of the court to return a verdict for the defendant and

the assignment of error upon that ruling presented this question, attention is called to the fact that this exception and assignment present nothing for review in this case, because the bill of exceptions contains only fragmentary portions of the evidence. It is impossible for an appellate court to determine whether or not the court below came to the true conclusion when it directed a verdict upon the evidence in the case, unless all the evidence before that court is presented to the reviewing court for its consideration. *Taylor Craig Corp. v. Hage*, 32 U. S. App. 548, 552, 16 C. C. A. 339, 340, and 89 Fed. 581, and 583. The complaint of the ruling of the court below upon the question of *res adjudicata* cannot be sustained."

"A stipulation made by an attorney in one action will not bind his client in another, unless the latter expressly acquiesces in it in the second suit." *Board of Comrs. of Lake County, Colo., v. Sutliff*, 38 C. C. A. 167, 97 Fed. 270.

Res adjudicata as to constitutional debt limit; bonds to refund judgment.

1105. (Colo. 1899.) "The sixth defense was that the debts upon which the judgments which were paid by the refunding bonds were rendered were invalid because the county had reached the constitutional limit of its indebtedness before those debts were incurred, and this fact was not presented to, nor its legal effect adjudicated by, the court in the actions in which the judgments were entered. But the plaintiff, Geer, holds bonds and coupons issued in payment of these judgments. He stands in privity with the plaintiffs in those judgments, to the extent that he may invoke and rely upon every presumption and estoppel of which they might have availed themselves; and in an action between the same parties, or those in privity with them, upon the same claim or demand, a judgment upon the merits is conclusive, not only of every matter offered, but of every admissible matter which might have been offered, to sustain or defeat the claim or demand." *Board v. Platt*, 49 U. S. App. 216, 224, 25 C. C. A. 87, 92, 79 Fed. 567, 572, reaffirmed. *Geer v. Board of Comrs. of Ouray County, Colo.; Comrs. of Ouray County v. Geer*, 38 C. C. A. 250, 97 Fed. 435.

Pending suit.

1106. (S. Car. 1900.) "Be this as it may, 'the question of *lis pendens*, as applicable to negotiable securities, was fully considered by us in the case of *Warren County v. Marcy*, 97 U. S. 107, 24 L. Ed. 977, and we then held that a bona fide purchaser before maturity is not affected with constructive notice of a suit respecting such paper.' *Cass County v. Gillett*, 100 U. S. 593, 25 L. Ed. 585; *Thompson v. Perrine*, 103 U. S. 806, 26 L. Ed. 612." *Pickens Township v. Post*, 41 C. C. A. 1, 99 Fed. 659.

Judgment by state court; mandamus against city treasurer; effect same as if city were defendant by name; reversal of state judgment by state supreme court; given effect by federal court.

1107. (S. Dak. 1900.) In an action against the city of Pierre, upon interest coupons from bonds issued by the city, the city pleaded as a bar to the action a judgment of a State court in a mandamus proceeding wherein the plaintiff was the same and the defendant of record was the city treasurer of said city in his official capacity, and in which the validity of the same bonds and coupons was involved and the instruments held to be issued without authority of law and therefore void. It was contended that such judgment could not be pleaded and received in evidence as a former adjudication, for the reason that the parties and subject-matter in that suit were not the same as in the suit at bar. Held, that such judgment, while in force, was *res adjudicata*.

"While the mandamus suit was brought against the city treasurer, and not against the city by name, yet that officer was sued in his official capacity, and not as an individual. He did not defend the action for his personal benefit, but in right of the city, and, as custodian of its funds, to protect them against an illegal demand. The city permitted him to so defend and the defense was doubtless made at the city's expense. In that proceeding the city of Pierre was in reality challenging the validity of the bonds now in controversy in the name of its treasurer, and for its own benefit and advantage. If that suit had resulted differently, the city would not have been heard to say that it was

not bound by the judgment, because it was not sued in its corporate name, but in the name of one of its officers. The record also shows that the defenses interposed, litigated and decided in that proceeding were identically the same as those which were interposed and litigated in the case at bar, except the issue tendered by the plea of a former adjudication. Under these circumstances the last-mentioned plea was well made, and was sustained by the record made in the mandamus suit, which was introduced in evidence." Held, also, it appearing to this court that, since the trial of this case in the Circuit Court, said former judgment had been reversed by the Supreme Court of the State, that it was the duty of this court to recognize and give effect to such judgment of that court, setting aside such former adjudication. *Ransom v. City of Pierre*, 41 C. C. A. 585, 101 Fed. 665.

Conclusiveness of judgment; collateral attack; agreement by corporate officers to withhold defenses.

1108. (Mont. 1900.) In a mandamus proceeding to compel a city to pay a judgment recovered against it, held, that a defense which might have been interposed to the original action, to wit, that the city was indebted beyond the constitutional limit when the indebtedness arose, but which was not then presented, cannot now be sustained against the writ, and the further allegation that the judgment was obtained by agreement between the creditor and the mayor of the city and the city council and in pursuance of an ordinance passed by the mayor and council that such defense should not be interposed, will not change the rule.

"The court had jurisdiction to hear and determine the question whether the mayor and city council had authority to pass this ordinance and enter into the agreement therein contained. This was part of the original case, and entered into the judgment; and, the court having determined that question in favor of the plaintiffs, the judgment, whether right or wrong, is not open to impeachment by collateral attack. This would be the rule, even though the allegation of the answer amounted to a charge that the judgment was

obtained through fraud or collusion." A number of authorities cited and discussed by the court. *Mayor, etc., of the City of Helena, et al. v. United States, ex rel., Helena Water Works Co.*, 43 C. C. A. 429, 104 Fed. 113.

Injunction by state court to restrain levy of taxes; unavailing as against federal courts.

1109. (Neb. 1900.) A taxpayer's suit in a State court, to which neither the plaintiff in error in this case, nor any one in privity with him, was a party, to enjoin the county commissioners and county clerk from levying taxes to pay bonds issued by the county, and the injunction of such court restraining the levying of such taxes, are futile against an action in the national courts brought against the debtor by holders of the bonds or against a mandamus to enforce a judgment rendered in such an action.

"A State court may not by injunction prevent a Federal court from proceeding to judgment in an action of which it has jurisdiction, or from enforcing its judgment by a mandamus to compel the levy and collection of taxes to pay it." *Clapp v. Otoe County, Neb.*, 45 C. C. A. 579, 104 Fed. 473.

Former adjudication not binding on bondholder who was not a party.

1110. (Iowa, 1901.) "The complainant was not made a party to that suit, nor were the rights of the bondholders passed upon in that litigation, so that there is no ground for holding that the adjudication in that case is binding upon complainant." *Burlington Sav. Bank v. City of Clinton*, 106 Fed. 269.

Judgment in suit on interest coupons, not res judicata as to bonds, when; lis pendens.

1111. (Texas, 1909.) "The argument in support of the conclusiveness of the judgment necessarily rests on the ground that the suit on the coupons created a lis pendens that prevented anyone from purchasing the bonds except subject to such judgment as might be rendered on that suit. But, clearly, the negotiability of the bonds was not destroyed by the

mere bringing or pendency of the suit on the coupons, although the issue in that suit as to the validity of the coupons may have incidentally involved an inquiry as to the validity of the bonds to which they were attached. It may be that the holder of negotiable coupons sued on, being also, at the time, the holder and owner of the bonds, may be concluded, as between him and the county, in a subsequent suit on the bonds, by a previous judgment on the coupons in the suit, in which the coupons were held invalid because attached to invalid bonds. But one who became a bona fide purchaser for value of the bonds, after the institution of the suit on the coupons, not being himself a party to or having notice of that suit, will not be concluded by the judgment as to the coupons. A suit on coupons and a suit on the bonds are based on different causes of action. The coupons and bonds were capable of separate ownership and of separate suits. Judgment might be rendered on coupons without producing the bonds to which they were originally attached."

Mr. Justice Harlan, who delivered the opinion, referred to and discussed a number of decisions. *Presidio County, Texas, v. The Noel-Young Bond & Stock Company*, 212 U. S. 58, 29 Sup. Ct. Rep. 237, — L. Ed. —.

Judgment of state court as to constitutionality of act, binding only on parties to suit.

1112. (Neb. 1902.) "It is only when the legal conclusion of a State court relative to the constitutionality of a statute of its State is based upon the same facts, upon the same statute, that it controls the decision of the Federal courts upon that question. The determination of the issues of fact which conditioned the terms and passage of a statute, like the finding of any other issue of fact, concludes no one, either in a State or in a Federal court, except the parties to the action in which the decision is rendered and their privies. And the finding of the Supreme Court of Nebraska, in *Webster v. City of Hastings*, that the words 'the title and' were not contained in the title of the amendatory

act of 1885 when it was passed, and its legal conclusion that the title without those words was unconstitutional estopped no court and no party but Webster, the City of Hastings, and their privies, from again litigating the questions there decided." *City of Beatrice v. Edmunson*, 54 C. C. A. 601, 117 Fed. 427.

Res judicata; conclusiveness of judgment on bonds.

1113. (Ky. 1906.) "But, although we have discussed in a running way the points presented by counsel for plaintiff in error, we are bound to say that we think that all of them which would at any time be regarded as substantial have been settled and determined by the judgment in the State court referred to in our former opinion and by the final judgment of the court below." *Estill County, Ky., v. Embry*, 75 C. C. A. 654, 144 Fed. 913.

Lis pendens; bona fide purchaser not affected by, in absence of actual notice.

1114. (Neb. 1907.) "At the time of his purchase a suit was pending in one of the courts of the State in which the election at which the bonds were voted was being contested and in which a temporary injunction restraining their registration and issuance had been granted. The suit was subsequently prosecuted to a successful conclusion of the contest, and the injunction was made perpetual. That he purchased with actual notice of the pendency of this suit is said to be a necessary conclusion from the fact that the banker through whom he purchased told him at that time that a suit had been brought to prevent the registration of the bonds by the State officers. The claim is fallacious. It ignores a material part of what the banker said, that is, that the suit had been dismissed, which could have been reasonably regarded as confirmed by his possession of the bonds bearing certificates of their due registration and issuance signed by the designated State officers. Thus, a finding that Shepard purchased without actual notice of the pendency of the suit was at least an admissible one under the evidence.

Clark v. Evans, 13 C. C. A. 433, 66 Fed. 263; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Cromwell v. County of Sac, 96 U. S. 51, 58, 24 L. Ed. 681."

"It sometimes happens, as in the present case, that such securities are issued or negotiated in violation of a subsisting injunction in a pending suit, but that can make no difference in the rights of one who is in fact a bona fide purchaser, for the obvious reason that constructive notice of the injunction cannot be charged against one who is in no way charged with notice of the suit. Lexington v. Butler, 14 Wall. 282, 20 L. Ed. 809; County of Warren v. Marcy, 97 U. S. 96, 109, 24 L. Ed. 977; County of Cass v. Gil-

lett, 100 U. S. 583, 593, 25 L. Ed. 585; Tregea v. Modesto Irrigation District, 164 U. S. 179, 187, 17 Sup. Ct. 52, 41 L. Ed. 395." School Dist. No. 11, Dakota County, Neb., v. Chapman, et al., 82 C. C. A. 35, 152 Fed. 887.

Judgment in taxpayer's suit not binding on bondholder.

1115. (Minn. 1906.) In action to recover on municipal bonds by a holder thereof, held: "The injunctive order in the taxpayer's suit in itself constitutes no defense to this action. Clagett was not a party to that suit and is not affected by its result. City of Mankato v. Barber Asphalt Paving Co., 142 Fed. 329." Clagett v. Duluth Tp., 74 C. C. A. 620, 143 Fed. 824.

CHAPTER XVIII.

RAILROAD-AID BONDS.

There are some cases involving the validity of railroad-aid bonds in which the questions determined are peculiar to that class of municipal bonds and legislation on the subject of aid to railroad companies by municipalities. It seems appropriate to insert such cases in a separate chapter.

Bonds voted to one company issued to another; held void.

1116. (Ill. 1870.) A statute of Illinois authorized any county in the State to subscribe for stock in any railroad company and pay for the stock in its bonds, when previously sanctioned by a majority of the qualified voters of the county at an election called for that purpose, and required the notices calling the election to specify the company in which the stock was to be subscribed. The voters at an election authorized aid to the M. & W. Railroad Company, with 238 miles of road extending across the entire State. This road was divided by legislative enactment into three independent branches under the management of three distinct corporations, and the bonds were issued to one of the three companies thus formed.

Holding the bonds void, the court say: "A subscription to a company whose charter provided for a continuous line of railroad of two hundred and thirty miles, across the entire State, was voted by the electors of Fulton county; not a subscription to a company whose line of road was less than sixty miles in extent, and which, disconnected from the other portions of the original line, would be of comparatively little value." *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040.

Construction of grant of power.

1117. (Wis. 1872.) Held, that the declaration in an act that the provisions of a prior act are extended and shall

include the M. & W. Railroad Company "and any other company duly incorporated and organized," etc., should be construed to include such companies so incorporated and organized both before and after its enactment. *James v. Milwaukee*, 16 Wall. 159, 21 L. Ed. 267.

Railroad beyond limits of county and state.

1118. (Nebr. 1872.) "One other objection to the constitutionality of the act is urged. It is that it authorized aid to a railroad beyond the limits of the county, and outside the State. There is nothing in this objection. It was for the legislature to determine whether the object to be aided was one in which the people of the State had an interest, and it is very obvious that the interests of the people of Otoe county may have been more involved in the construction of a road giving them a connection with an eastern market than they could be in the construction of any road wholly within the county." *Railroad Co. v. County of Otoe*, 16 Wall. 667, 21 L. Ed. 375.

Consolidation of railroad company after contract of subscription to its stock.

1119. (Ill. 1875.) Though it is a general rule that a subscriber to the stock of a railroad company is released from obligation to pay his subscription by a fundamental alteration of its charter, the consolidation of a company to whose stock a county had subscribed

with another company will not release the parties from the obligations of such contract of subscription when it appears that, at the time of such subscription, the laws in force contemplate such consolidation. "In the case in hand the county had, under lawful authority, undertaken to subscribe for stock before the consolidation was made, and the undertaking had been accepted. A liability had been incurred, and the business agents of the county, to whom exclusively the law intrusted the management of its affairs, consented to and promoted the consolidation. And the subscription was made in full view of the law that allowed an amalgamation with another company. The contract was made with reference to that law. Nothing has taken place which the county was not bound to anticipate as likely to happen, and to which the people in voting for the subscription, and the board of supervisors in directing it, must not be considered as having consented."

Subscription by county to railroad stock; how may be made.

A county may become a subscriber to the capital stock of a railroad company without formally making a subscription upon the books of the company. An order or resolution of the county board having authority to make such subscription, and reciting a subscription by the county for a specified number of shares of stock, and acceptance of such action by the railroad company, held to be sufficient. *Nugent v. Supervisors*, 19 Wall. 241, 22 L. Ed. 83; *County of Moultrie v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 631, 33 L. Ed. 631.

Railroad aid voted to one company does not authorize subscription to consolidated company.

1120. (Mo. 1875.) A statute authorized subscriptions to the stock of railroad companies and the issuing of bonds in payment therefor by townships. A township in Bates county voted a subscription to one company, but the county commissioners, on behalf of the township, subscribed to the stock of a company formed by the consolidation of the first-named company with another, and issued bonds therefor to the consolidated company. Held to be unauthorized.

"This consolidation was effected under a law of Missouri authorizing consolidations, and declaring that the company formed from two companies should be entitled to all the powers, rights, privileges, and immunities which belong to either; and it is contended that this provision of the law justified the County Court in making the subscription, without further authority from the people of the township. But did not the authority cease by the extinction of the company voted for? No subscription had been made. No vested right had accrued to the company." *State v. Linn County Court*, 44 Mo. 510, distinguished. *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747.

Railroad aid; what is.

1121. (Ill. 1876.) The fact that a corporation authorized to construct and operate a railroad was authorized also to engage in mining coal does not affect its character as a railroad company within the meaning of the Railroad-Aid Law of Illinois. *County of Randolph v. Post*, 93 U. S. 502, 23 L. Ed. 957.

Election held before enabling act passed.

1122. (Kan. 1876.) An enabling statute required a favorable vote to authorize the issuance of bonds. Held, that such vote taken before the act was passed complied with the requirements of the act. *County of Leavenworth v. Barnes*, 94 U. S. 70, 24 L. Ed. 62.

1123. (Kan. 1876.) It is no defense to bonds that the name of the railroad company for whose benefit they were issued was not mentioned in the submission of the question to the voters. *Comrs. of Johnson County v. Thayer*, 94 U. S. 631, 24 L. Ed. 133.

Consolidation of railroad companies.

1124. (Mo. 1876.) The consolidation of one railroad company with another does not extinguish the power of counties to subscribe or the privilege of the company to receive subscriptions of stock authorized before the consolidation when the general laws of the State provide for such consolidation. *Harshman v. Bates County*, 92 U. S. 569, distinguished. *County of Scotland v. Thomas*, 94 U. S. 682, 24 L. Ed. 219.

Stock subscription; construction of act; formal subscription on books of company unnecessary.

1125. (Ill. 1876.) A statute of Illinois authorizing municipal corporations to subscribe to the capital stock of railroad companies, and issue their bonds therefor, provided "that if a majority of the legal voters of such town * * * voting at such election, shall be in favor of such subscription, then it shall be deemed and held that said town * * * has taken stock in said railroad company according to the proposals made in said petition to said clerk."

An election was held, resulting in favor of the subscription, and bonds were issued reciting that they were issued in pursuance of the authority given at the election by the voters of the town and in pursuance of the authority of the statute which was referred to. Held, to be no defense to the bonds that there had been no formal subscription to the stock on the books of the company.

"We think the statute intended to make a majority vote of the legal voters of the town who voted at such an election an equivalent to and substitute for a subscription upon the books of the company." *Town of East Lincoln v. Davenport*, 94 U. S. 801, 24 L. Ed. 322.

Railroad incorporated on day of election.

1126. (Mo. 1877.) It is not a defense to the validity of bonds that the railroad company to which they were issued was not incorporated until the day of the election, held on the proposition to issue the bonds, as the company had been incorporated when the subscription was made. *County of Cass v. Johnson*, 95 U. S. 360, 24 L. Ed. 419.

Rights of succeeding company.

1127. (Mo. 1877.) After a subscription to one railroad company had been made by a county pursuant to a legal vote of the electors, that company transferred all its effects, assets, rights, and privileges to another company with the acquiescence of the county authorities. Held, that the latter company thereby acquired a vested right to demand and receive the bonds of the county in payment of such subscription. *County of Ray v. Vansycle*, 96 U. S. 675, 24 L. Ed. 800.

Actual subscription, when necessary.

1128. (Mo. 1877.) Referring to and distinguishing the case of *County of Moultrie v. Sav. Bank*, 92 U. S. 631, held, that, in the case before the court, an actual subscription was required.

"The present case is quite a different one. The order of the County Court was not intended, as in the cases referred to, to be final and self-executing. While it recited that the sum named should be, and was thereby, subscribed, it 'authorized and directed' the agent 'to make said subscription on the stock-books of the said company,' upon the conditions specified, and to report to the court thereon. Having failed, for the reasons given by him, to make the subscription, the agent reported to the County Court his doings, and 'that the bonds of the township are not, therefore, subscribed;' and the County Court approved his report." *County of Bates v. Winters*, 97 U. S. 83, 24 L. Ed. 933.

Rights of consolidated company.

1129. (Mo. 1878.) "It is also established by the same authority that the consolidation of one railroad company with another company does not extinguish the power of a county to subscribe, or the privilege of the company to receive subscriptions; and this although the consolidation be made by authority given after the Constitution took effect, and although the subscription be made to the stock of such newly-organized company, and the bonds be issued after the same period. These are held to be features constituting alterations merely of the charter, and not affecting the rights or powers of the companies to receive subscriptions or of counties to issue their bonds." *County of Schuyler v. Thomas*, 98 U. S. 169, 25 L. Ed. 88.

Actual subscription not necessary.

1130. (Mo. 1879.) "An actual manual subscription on the books of the company was not necessary to entitle the county to the stock, or to bind it as a subscriber thereto." *County of Cass v. Gillett*, 100 U. S. 585, 25 L. Ed. 585.

Bonds issued to consolidated company.

1131. (Ill. 1879.) Held, that, as the general statute of Illinois gave authority to railroad companies to consolidate, the consolidated company

succeeded to the right to the aid voted by the township. *Empire v. Darlington*, 101 U. S. 87, 25 L. Ed. 878.

Designation of the railroad company.

1132. (N. Y. 1879.) It was urged that the bonds were void, because the written assent of the taxpayers required by the statute did not express the railroad corporation to which the money to be borrowed by the town should be paid. Held, "We think this position is quite untenable. The identification of the company in the written assent is as perfect as it would have been had it been described by its corporate name. The statute did not require that the taxpayers should 'express' (that is, designate) the company by its name. Any mode of description that designated it was sufficient."

Which assessment-roll.

The statute required, "That the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll made next previous to the time such money may be borrowed, shall be obtained, verified, and filed in the clerk's office."

A written assent based on the assessment-roll of 1852 was filed on January 11, 1853. On objection that the assessment-roll of 1852 did not apply, held, "Then (January 11, 1853) the authority to issue the bonds, borrow the money, subscribe for the stock, and elect railroad commissioners became perfect. The town did elect railroad commissioners on the 1st of March, 1853, the subscription for the stock of the company was made, a debt of \$25,000 therefor was incurred, and the bonds or notes for an equal amount were executed, and at least some of them were sold at par and the proceeds of the sale were paid on account of the subscription, all before any new assessment-roll could be completed and before the law required any to be made." *Scinio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037.

Consolidation of railroad companies as affecting validity of bonds.

1133. (Wis. 1880.) On this point the court reaffirms *Scotland County v. Thomas*, 94 U. S. 682; *Wilson v. Salamanca*, 99 U. S. 499. *Menasha v. Hazard*, 102 U. S. 81, 26 L. Ed. 83.

Statutory limitation on power to subscribe to stock in railroad company construed.

1134. (Ark. 1880.) Held, in this case, that the statute under which the bonds in suit were issued did not restrict the county to a single subscription.

"Its language is, 'Any county in this State may subscribe to the stock of any railroad in this State * * * and may issue bonds for the amount, etc., provided that the amount of such subscription shall not exceed one hundred thousand dollars.' That is, the power to subscribe is general, but no subscription shall exceed \$100,000." *County of Chicot v. Lewis*, 103 U. S. 164, 26 L. Ed. 495.

Consolidation of railroad companies after donation voted to one of the constituent companies.

1135. (Ill. 1880.) "We are of opinion that there is nothing of substance in this objection. The act incorporating the Illinois Southeastern Railway Company, the act amendatory thereof, and the act in relation to the Pana, Springfield and Northwestern Railway Company (even if the general statutes of the State were not sufficient for the purpose), fully authorized the consolidation between those two companies and upon such consolidation the new company succeeded to all the rights, franchises, and powers of the constituent companies. The power in the township to make a donation to aid in the construction of the Illinois Southeastern railway was also a privilege of the latter corporation, and that privilege, upon the consolidation, passed to the new company. The donation was voted before the consolidation took effect, and since the consolidated or new company did not propose to apply such donation to purposes materially different from those for which the people voted it in 1868, its right to receive the donation, at least when the township assented, cannot be doubted. The records of the township show that the bonds were directed to be issued and delivered to the new company, and it will not, under the circumstances, be allowed to say, as against a bona fide purchaser for value, that the bonds are invalid. There is, consequently, no pretext for saying that a burden was imposed upon the people to which they had never given their consent in the mode prescribed

by law." *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411.

Donating property to railroad company instead of issuing bonds to aid it.

1136. (Mo. 1880.) In this case it was held that the inhibition of the Constitution of Missouri against authorizing any county, city, or town to become a stockholder in, or to loan its credit to any company, association, or corporation unless two-thirds of the qualified voters thereof assent thereto applies to the purchase of property to be given to such company, association, etc., for which its obligations would be given to others as well as to the issue of obligations directly to such company, corporation, or association. *Jarrott v. Moberly*, 103 U. S. 580, 26 L. Ed. 492.

Aid voted to one company and issued to a consolidated company.

1137. (Mich. 1881.) "We concur with the court below in holding that the aid voted must be deemed to have been given in view of the then existing statute, authorizing two or more railroad companies forming a continuous or connected line to consolidate and form one corporation, and investing the consolidated company with the powers, rights, property, and franchises of the constituent companies." *New Buffalo v. Iron Co.*, 105 U. S. 73, 26 L. Ed. 1024.

Bonds issued to consolidated railroad company, but voted to constituent.

1138. (Mich. 1882.) Held to be authorized.

"This precise question was before us at the last term in *New Buffalo v. Iron Co.*, 105 U. S. 73, and decided adversely to the claim of the plaintiff in error." *Chickaming v. Carpenter*, 106 U. S. 663, 1 Sup. Ct. Rep. 620, 27 L. Ed. 307.

City guaranteeing a railroad company's bonds.

1139. (Ga. 1883.) A statute conferring upon the mayor and aldermen of the city of Savannah power, "To obtain money on loan on the faith and credit of said city for the purposes of contributing to works of internal improvements," authorized the city to pledge its credit to aid a railroad

company by guaranteeing the bonds of such company.

"The money paid for the guaranteed bonds was obtained on loan and upon the faith and credit of the city, and it was for the purpose of contributing to works of internal improvement. The fact that it was not advanced directly to the city, but, upon its assurance of repayment, to the railroad company, is not a departure even from the letter of the law, much less its meaning; nor does the fact that the money was advanced partly on the credit of the railroad company diminish the presumed reliance of the purchaser upon that of the city with which it was joined." *City of Savannah v. Kelly*, 108 U. S. 184, 2 Sup. Ct. Rep. 468, 27 L. Ed. 696.

Rights of consolidated company.

1140. (Mo. 1883.) "If only a sale of the road to another company had been authorized and made, then it might very plausibly have been contended that the purchasing company took and held it under its own charter only, without the franchises and privileges connected with it in the hands of the vendor company; but 'consolidation' is not sale, and when two companies are authorized to consolidate their roads, it is to be presumed that the franchises and privileges of each continue to exist in respect to the several roads so consolidated." *Green County v. Conness*, 109 U. S. 104, 3 Sup. Ct. Rep. 69, 27 L. Ed. 872.

Manner of making subscription.

1141. (Mo. 1884.) The entry of subscription to the stock of a railroad company on its subscription-books is not necessary to consummate the contract of subscription.

"Undoubtedly, if there had been at that time any book prepared in which subscriptions were to be made, Betz would have entered the subscription of the County Court in that book in proper form. But what he did was in its legal effect the same. He presented the action of the County Court in respect to the subscription for acceptance. That action was in the form of a present subscription upon certain conditions, and in his presence it was, when presented, formally accepted by a resolution of the directors as and for a subscription to the capital stock of the company."

Consolidation of railroad companies after subscription.

"As the Lexington, Chillicothe and Gulf Company was organized under the General Railroad Law of Missouri, which authorized consolidations, the subsequent consolidation of that company with another organized under the same law did not avoid the subscription which was made to its stock on the 17th of June, and the bonds in payment of the subscription were properly delivered to the consolidated company." *Bates County v. Winters*, 112 U. S. 225, 5 Sup. Ct. Rep. 157, 28 L. Ed. 744.

Change of constitution after subscription, but before issue of bonds.

1142. (Ill. 1887.) A subscription to the stock of a railroad company by a municipality in Illinois, made prior to the adoption of the Constitution of 1870, might be completed by an issue of bonds after the adoption of said Constitution. *Concord v. Robinson*, 121 U. S. 186, 7 Sup. Ct. Rep. 937, 30 L. Ed. 885.

Bonds issued to consolidated railroad company.

1143. (Mo. 1888.) Under the laws of Missouri for stock of a railroad company subscribed by a county, bonds may be issued to a consolidated company of which the first named is one of the constituent companies. Cases on this point reviewed. *Livingston County, Mo., v. First National Bank of Portsmouth, N. H.*, 128 U. S. 102, 9 Sup. Ct. Rep. 18, 32 L. Ed. 359.

Failure of railroad company to designate counties through which it would pass.

1144. (N. Y. 1888.) "As the bonds in suit were issued without any previous action of the company designating all the counties through which would pass the road authorized by the act of 1871 to be constructed, they must be held to have been issued without authority of law, and cannot, therefore, be the foundation of a judgment against the town." *Purdy v. Lansing*, 128 U. S. 557, 9 Sup. Ct. Rep. 172, 32 L. Ed. 531.

Railroad company selling bonds below par, does not affect rights of subsequent holder.

1145. (Pa. 1861.) The law authorizing the issue of bonds required that the railroad company to which they were issued should not sell them at less than par value. Held, that the right of the holder of such bonds, and the coupons, to recover their par value was not affected by the fact that the railroad company paid them out to contractors for sixty-four cents on the dollar. *Richardson v. Lawrence County*, 154 U. S. 536, 14 Sup. Ct. Rep. 1157, 17 L. Ed. 558.

Condition that bonds should not be binding until road completed.

1146. (Ky. 1898.) A condition of the enabling act was that the bonds "shall not be binding 'until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same.'" This was construed by the court to mean not that a railroad should be partially completed from one end of the county to the other, but that a railroad should be so completed within and substantially through the county that a train of cars passes over it. *Provident Life & Trust Co. v. Mercer County*, 170 U. S. 593, 18 Sup. Ct. Rep. 788, 42 L. Ed. 1156.

Ultra vires.

1147. (Kan. 1893.) A county having general authority to issue its bonds to aid in the construction of railroads, issued such bonds to aid the D., M. & A. Railway Company, whose charter authorized it to construct a narrow-gauge railroad only. The agreement, however, between the company and the county was for a standard-gauge road, which was constructed, and the bonds were delivered by the company. Held, in an action on such bonds, the county could not maintain the defense of ultra vires, because the railway company was authorized by its charter to build only a narrow-gauge railroad. *Board of Comrs. of Kingman County v. Cornell University*, 6 C. C. A. 296, 57 Fed. 149.

Railroad aid bonds; who should execute; statute construed.

1148. (N. C. 1906.) Railroad aid bonds of Onslow County, N. C., were issued in pursuance of a statute which provided that when the bonds were authorized by the voters of the county, the county commissioners should "appoint a board of trustees consisting of not less than three resident taxpayers of the county * * * who shall issue the bonds of said county * * * to the amount so voted at said election, in such forms and denominations and running for such length of time as may be determined on by said county commissioners."

The bonds were signed by the clerk and chairman of the board of county commissioners and the county treasurer, in pursuance of an order made by the board of county commissioners that the "county commissioners shall issue" such bonds, "to be executed according to law."

It was urged that the bonds were not legally executed.

"In considering the question here raised, we shall leave out of view any possible application of the doctrine of estoppel. The language of the act of 1885, in so far as now of importance, is found in section 14, ante. The amendments do not seem to affect the question before us. While the act above quoted is not as specific as it might be concerning the execution of the bonds, we are satisfied that the direction that the bonds 'of said county' are to be 'issued' by a board of trustees should not be construed as requiring that the bonds should be executed by the trustees. The word 'issue' was, we think, used in its ordinary sense, and means 'send out,' 'emit,' 'deliver.' See 4 Words and Phrases, 3779. *Corning v. Comrs.*, 102 Fed. 57, 60, 42 C. C. A. 154; *Perkins County v. Graff*, 114 Fed. 441, 444, 52 C. C. A. 243. As the act of 1885 is therefore silent on the subject of the execution of the bonds we think the intent was that the bonds should be executed by the board of commissioners of Onslow county. By section 702 of the Code of North Carolina, every county is declared a body politic or corporate. By section 703 the powers of a county are to be exercised

by the board of commissioners, or in pursuance of a resolution adopted by them. One of the powers of the counties to be thus exercised is (section 704, Code) to make contracts. By section 712 it is made the duty of the clerk of the board 'to record all the proceedings of the board; to enter every resolution or decision concerning the payment of money, and to record the vote of each commissioner on any question submitted to the board, if required by any member present.' The records kept by the clerk of the board do not show a formal resolution directing the execution of the bonds."

Delivery of bonds, by whom.

"The objection that delivery of the bonds was made by the board of county commissioners, and not by the board of trustees, as directed by the statute above mentioned, seems to us without merit. We regard the provision as merely directory, and therefore of such nature that disregard thereof could not have the effect of invalidating the bonds. Again, we think this provision was made solely for the benefit of the railroad company. As we read the statute, the intent was that the county commissioners should execute all of the bonds, and put them in escrow, so to speak, in the hands of the trustees, to be by the latter delivered from time to time as the work of construction advanced. The refusal of the commissioners to execute the bonds and the delay caused by the resulting litigation, made the use of the method provided by the statute unnecessary. The railroad company therefore waived, as it had the right to do, the provision in question, and elected to receive the bonds accepted in compromise directly from the county commissioners. The fact that the bonds issued provide for annual payment of interest, while the act of 1885 specified semi-annual interest payments, seems to us of no moment. This provision was made for the benefit of the railroad company. If the company was willing to and did waive the benefit thereof, and accepted bonds providing for only annual interest payments, such fact cannot invalidate the bonds, and such contention is not

made." Board of Commissioners of Onslow County, et al. v. Tollman, 76 C. C. A. 317, 145 Fed. 753.

Delivery of railroad aid bonds before conditions performed.

1149. (Ky. 1906.) "Another objection is, as stated, that the act requires that the bonds shall be prepared and executed before any work is done by the railroad company, and shall be held by a trustee, to be delivered upon performance of the prescribed conditions, and that here the bonds were delivered before the conditions had been performed. But these facts would not necessarily render the bonds void. Conditions might exist under which the bonds thus prematurely delivered would be valid and enforceable, as if they passed, as they probably would, into the hands of an innocent purchaser. The question of their validity would depend upon the facts, which would be considered and determined by the court in which suit should be brought to enforce them." Estill County, Ky., v. Embry, 75 C. C. A. 654, 144 Fed. 913.

Issuance of railroad aid bonds raises presumption of performance of conditions; construction of contract of subscription as to such conditions.

1150. (Ky. 1909.) In a suit praying judgment upon bonds of Green County, the county urged that the bonds were void because the conditions, expressed in the vote on the question of their issuance had not been fulfilled.

"The conditions relied on in defense are two, and they are subject to different considerations.

"The condition that the bonds should not be issued until the county had been 'exonerated' from a subscription theretofore authorized to be made to the stock of the Elizabethtown & Tennessee Railroad is a condition precedent to the lawful issue of the bonds. As these bonds contained no recital importing that the conditions had been performed, it was open to the county to show, even against a purchaser for value before maturity without notice, that the conditions had not been performed. But the issue of bonds in payment of a sub-

scription to railroad stock by an officer charged with the duty of ascertaining whether the conditions indispensable to the lawful issue had been fulfilled, raises a presumption of their fulfillment prior to the issue. A lawful holder of the bonds is entitled to rely upon this presumption, although he incurs the danger that the presumption will be overcome by evidence. If he wishes absolute security in this respect, he must insist upon a recital. This much was determined by the decision of this court when the case was here before. Quinlan v. Green County, 205 U. S. 410. That case did not decide that there was a presumption of performance arising out of the length of time, during which no claim was made in respect of the Elizabethtown & Tennessee Railroad subscription, but that there was a presumption of performance before the issue of the bonds. When we come to look at the facts found by the Circuit Court there is nothing to rebut this presumption. On the contrary, everything tends to support it. Even the wide range of the argument for the defendant did not suggest a single fact which could, to the slightest extent, control the presumption. The conclusion follows that the exoneration from the prior subscription had happened before the issue of the bonds to the Cumberland & Ohio Railroad Company. That condition has been performed, and is not available as a defense.

"We must next consider the effect of the provision in the vote, that the subscription to the stock payable in bonds shall be 'upon condition that said company shall locate and construct said railroad through the said county of Green, and within one mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green county.' If this part of the vote imposes a condition upon the lawful issue of the bonds or upon the obligation of the county to pay them, the defense must prevail, for the condition has not been performed. Only \$150,000 have been expended within the limits of the county, and the railroad, though constructed to Greensburg, a distance of five miles, was not carried further, although it was lo-

cated from north to south through the county, a distance of twenty miles. It is not conclusive that the obligation thus imposed upon the railroad company is called a condition. It frequently has been the case that the word condition has been used in written instruments in a looser and broader sense than the law attaches to it. In ascertaining the true meaning of instruments in writing courts do not confine their attention to single words, phrases or sentences. The meaning is sought from the whole instrument, viewed in the light of the subject with which it deals. This general rule of interpretation often makes it manifest that that which is called a condition is really but a cove-

nant or agreement, to be performed independently of the counter obligation with which it is associated. When such an intent is discovered the courts have no difficulty in giving it effect, though the result be to disregard the technical meaning of the word condition. *Stanley v. Colt*, 5 Wall. 119; *Sohier v. Trinity Church*, 109 Mass. 1; *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Cassidy v. Mason*, 171 Mass. 507; *Clapp v. Wilder*, 176 Mass. 332; *Post v. Weil*, 115 N. Y. 361; *Clark v. Martin*, 49 Pa. St. 289; *Watrous v. Allen*, 57 Mich. 362; *Scoville v. McMahon*, 62 Conn. 378; *Hartung v. Witte*, 59 Wis. 285." *Green County v. Quinlan*, 211 U. S. 582, 29 Sup. Ct. Rep. 162, — L. Ed. —.

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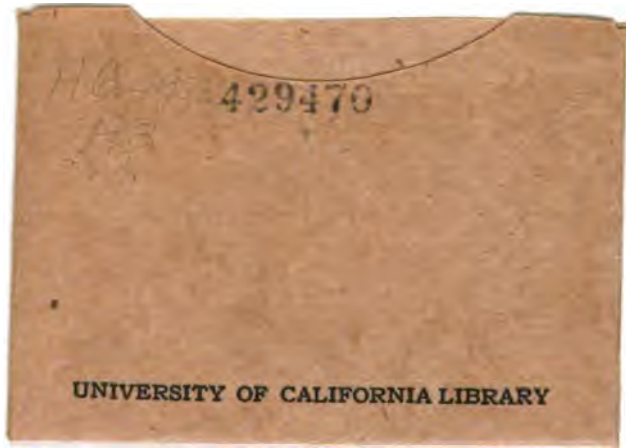
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